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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 103

TWENTIETH CENTURY-FOX FILM CORPORATION, et al., *Petitioners,*

—against—

SAMUEL GOLDWYN, et al., doing business as GOLDWYN PRODUCTIONS, a limited partnership, successors in interest to the plaintiff Samuel Goldwyn Productions, Inc., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 20, 1964

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

TWENTIETH CENTURY-FOX FILM CORPORATION, FOX WEST COAST THEATRES CORPORATION, FOX WEST COAST AGENCY CORPORATION and NATIONAL THEATRES CORPORATION,

Petitioners,

—against—

SAMUEL GOLDWYN, FRANCIS HOWARD GOLDWYN, SAMUEL GOLDWYN, JR., JAMES A. MULVEY, and BEN FISH, doing business as GOLDWYN PRODUCTIONS, a limited partnership, successors in interest to the plaintiff Samuel Goldwyn Productions, Inc.,

Respondents.

No. ....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Twentieth Century-Fox Film Corporation, Fox West Coast Theatres Corporation, Fox West Coast Agency Corporation and National Theatres Corporation, pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit, dated and entered January 24, 1964. A re-hearing was denied on March 12, 1964.

The judgment sought to be reviewed, affirmed in part and reversed in part two decisions of the United States District Court for the Northern District of California, Southern Division, dated October 3, 1956, and May 4, 1961, respectively.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 328 F. 2d 190. The case was before the court below on cross-appeals from decisions and judgments by two District Court Judges at different stages of the proceedings. The first decision of the District Court was by the late Judge Edward P. Murphy. On October 3, 1956, he granted defendants' motion for partial summary judgment as to all claims accruing more than three years prior to the filing of the complaint. He also made pre-trial rulings on certain matters relating to the so-called *Paramount* case.* His decision is reported in 146 F. Supp. 905. The case went to trial before Judge Murphy. Unfortunately, he died before rendering his decision. The case was then submitted to Judge George B. Harris on the record made before Judge Murphy. Judge Harris's decision in favor of plaintiff is reported at 194 F. Supp. 507. The Court of Appeals reversed Judge Murphy's decision and affirmed the decision of Judge Harris. The opinions below are annexed as Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1964. Defendants' (petitioners') petition for a rehearing was denied on March 12, 1964. The jurisdiction of this Court is invoked under the provisions of Section 1254(1) of Title 28, United States Code. The jurisdiction of the District Court was invoked under Sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737, Title 15 United States Code, Sections 15, 26.

**United States* v. *Paramount Pictures*, 334 U. S. 131. The rulings concerning that case are, in the main, the basis upon which this petition is filed. The essence of Judge Murphy's decision was that the running of the statute of limitations was not tolled in plaintiff's favor by the *Paramount* case and that the judgment in that case was not admissible as *prima facie* evidence in plaintiff's private right action.

QUESTIONS PRESENTED

The four questions presented to this Court for review are unusual in that there is a conflict among the circuits as to each. This Court has never given an authoritative answer to any of the four. The questions arise from a treble damage action by a major affiliated producer of motion pictures, Samuel Goldwyn, against two of the defendants in the *Paramount* case and ten others which were not defendants in that case. The questions relate principally to the use which a participant in and beneficiary of a conspiracy in a prior Government action, here Mr. Goldwyn, may make of Section 5 of the Clayton Act against some, but not all, of his co-participants in the conspiracy found in the Government action. Indeed, Mr. Goldwyn was himself a defendant at one stage of the *Paramount* case, was a one-fifth owner for many years of United Artists Corporation, a defendant in that case, and was a producer who by definition in the *Paramount* complaint, was not a person for whose benefit the *Paramount* case was brought. The questions are these:

1. May one who is charged with being a participant in and beneficiary of a conspiracy in an antecedent Government action rely upon such Government action, under Section 5 of the Clayton Act, to suspend the running of a statute of limitations in a private right action?

2. May one who is charged with being a participant in and beneficiary of a conspiracy in an antecedent Government action claim, as plaintiff in a private right action, the benefits of Section 5 of the Clayton Act when he offers a final decree in the Government action as *prima facie* evidence against his co-conspirators as establishing the conspiracy alleged in his own action?

3. Did petitioners waive the California one-year statute of limitations, although pleading it as a partial defense, be-

cause the District Court had previously granted petitioners' motion for a summary judgment based on the California three-year statute?

4. May a participant in and beneficiary of a conspiracy in an antecedent Government action recover against his alleged co-conspirators?

THE STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, 15 United States Code, Section 1, provides, in pertinent part, as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 2 of the Sherman Act, of 26 Stat. 209, 15 United States Code, Section 2, provides, in pertinent part, as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, ..."

Section 5 of the Clayton Act, 38 Stat. 731, 15 United States Code, Section 16, provides, in pertinent part, as follows:

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title,

as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . .

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . ."

STATEMENT OF THE CASE

Respondents are the successors in interest of the plaintiff in the District Court, Samuel Goldwyn Productions, Inc., a corporation which claimed that it was the owner of alleged rights relating to twenty-seven motion pictures. Plaintiff claimed that, with respect to the twenty-seven pictures, it or its assignors had received inadequate film rentals from the defendants. Payment of such inadequate film rentals was alleged to have resulted from a conspiracy and monopoly in violation of the federal anti-trust laws. Trebled damages were claimed for injury to plaintiff arising from that conspiracy and monopoly.

It is undisputed that plaintiff in the District Court was controlled by Samuel Goldwyn and that all the motion pictures involved in the case at bar were produced by Samuel Goldwyn. As used here, therefore, the word "Goldwyn" refers to the plaintiff in the District Court, its successors in interest (respondents here) and Samuel Goldwyn, individually.

The complaint was filed on May 16, 1950. Damages were claimed for a period of 13 years prior to the filing of the complaint, that being the period of time over which the twenty-seven motion pictures were distributed. Only seven of such pictures had been produced and distributed within the period

of three years prior to the institution of the action, and only two of such pictures had been produced and distributed within one year prior to suit.

There were two groups of defendants known, respectively, as the "Fox" defendants and the "McNeil and Naify" defendants. The Fox defendants are the four petitioners here. The McNeil and Naify defendants were five corporations and two individuals named R. A. McNeil and Michael A. Naify. A separate trial was ordered as to those defendants on March 18, 1955. The case proceeded to trial only as to the Fox defendants. All proceedings and the trial, except as specifically noted, were before the late Judge Murphy.

In the long record of motion picture anti-trust litigation, only two actions by producers of motion pictures against their actual and potential customers who were operators of motion picture theatres have reached the courts for decisions. The first case resulted in a judgment directly opposite to the decision here. That case, *Eagle Lion Studios* v. *Loew's Inc.*, 141 F. Supp. 658 (S. D. N. Y. 1956), affirmed, 248 F. 2d 438 (2nd Cir. 1957), affirmed, 358 U. S. 100, involved a claim by a plaintiff which was not a defendant or affiliated with any defendant in the *Paramount* case and resulted in a decision for the defendants. The case at bar, which involves virtually the same issue raised in *Eagle Lion*, has resulted in a judgment for the plaintiff even though Samuel Goldwyn was a *Paramount* case defendant and participant in the conspiracy there complained of.

The essence of Goldwyn's claim, stripped of all superfluous and extraneous matters, is that he received inadequate film rentals from the defendants in this case for the motion pictures produced by him and exhibited by them. That situation is alleged to have come about as a result of a combination, conspiracy and monopoly among all the defendants here. The conspiracy charged against the defendants includes not only

the Fox defendants but also the McNeil and Naify defendants. The only claim made or asserted by Goldwyn, moreover, is against these two groups of defendants whom he has named as parties in this case. No claim is made and no charges are asserted against any other producers, distributors or exhibitors of motion pictures and none is alleged to have been a party to or a co-conspirator with any of the defendants in the combination, conspiracy and monopoly here alleged.

Petitioners pleaded as a partial defense that plaintiff's claims were barred by the applicable statute of limitations of California.* They had pleaded both the one-year statute, Section 340(1) of the California Code of Civil Procedure, and the three-year statute, Section 338(1) of the California Code of Civil Procedure. At that time, the decisions of the California federal courts, including the Court of Appeals below, indicated that the applicable statute was the three-year statute. The court below has, since its decision in this case, ruled in other litigation that the one-year statute applies.

To escape the bar of the statute, Goldwyn contended that, by virtue of Section 5 of the Clayton Act, the statute of limitations was suspended as to the petitioners Twentieth Century-Fox Film Corporation and National Theatres Corporation from July 20, 1938, the date when the United States, as plaintiff, filed its petition against those two petitioners and others in *United States* v. *Paramount*, 334 U. S. 131, until the complaint in this case was filed. The pertinent provisions of Section 5 of the Clayton Act are set out above.

It is necessary here to identify Goldwyn and his connection with the *Paramount* case. That case was filed in the United States District Court for the Southern District of New York, Equity No. 87-273, against Paramount Pictures Inc., the first named defendant, and the seven other leading producers and

*The four-year Federal statute of limitations, 15 United States Code, Section 15(b), did not become effective until January, 1956.

distributors of motion pictures, certain of their subsidiaries and the officers and directors of each. Twentieth Century-Fox and National were defendants in that case, as were Samuel Goldwyn and his own company, United Artists Corporation. Another defendant was RKO Radio Pictures, Inc., the company through which Goldwyn distributed his pictures after 1941, the year when he sold his stock and severed his connections with United Artists.

The nature of the *Paramount* case, the Government's claims and the parties to it are considered extensively below. The petitioners Fox West Coast Theatres Corporation and Fox West Coast Agency Corporation were not defendants in the *Paramount* case. None of the McNeil and Naify defendants was a party to that case.

The necessary effect of Goldwyn's contention is that the complaint in the case at bar is based upon matters "complained of" by the Government in the *Paramount* case and that the statute of limitations was suspended as long as that case was pending. Goldwyn further contended that the final judgment in *Paramount* constituted *prima facie* evidence of the conspiracy charged in his private right action. Those contentions were made despite the fact that, as we have noted, Goldwyn was originally named as a defendant in *Paramount* and, as we shall see, practices involving the distribution of his pictures were complained of and relied upon by the Government as establishing its claims against the defendants in that case.

The respective contentions of the parties with respect to the *Paramount* case came on for a hearing before Judge Murphy in the following manner: On June 14, 1956, Goldwyn filed a motion for a pre-trial conference that would bring on for a hearing a "request for a ruling as to the admissibility of the judgments, findings of fact and decree" in the *Paramount* case. Thereafter, on June 19, 1956, the petitioners here filed an application for a hearing and determination, prior to trial, of

their defense of the statute of limitations. A motion for summary judgment dismissing all claims which had accrued more than three years prior to filing of the complaint was then filed. Judge Murphy heard both motions at the same time.*

On October 3, 1956, Judge Murphy entered an order granting defendants' motion for a summary judgment dismissing all claims which accrued prior to May 16, 1947, three years before the complaint was filed. He also held that Goldwyn could not avail himself of the evidentiary benefits of the final judgment entered in *Paramount*. 146 F. Supp. 905. In brief, Judge Murphy ruled that Goldwyn's case was not and could not have been based upon any matter complained of by the Government in the *Paramount* case and that the final judgment in *Paramount* would not constitute an estoppel, as between the parties, if the Government had been plaintiff in the case at bar.

In deciding that the statute was not tolled by the *Paramount* complaint and that Goldwyn could not have the evidentiary benefits of Section 5 of the Clayton Act, Judge Murphy said (App. A, 5a-6a):

> "The Paramount complaint (amended and supplemental complaint, filed November 14, 1940) charged the eight principal motion picture companies with conspiracies unreasonably to restrain and monopolize the production, distribution and exhibition of motion pictures. The allegations relating to the effect of these conspirators upon the industry deal with independent, non-affiliated, producers, distributors, and exhibitors, against whom the conspiracy was directed. So far as

*The appeals below were heard on an original record. The questions here involved relate almost solely to the decision by Judge Murphy on the limitations issue and the effect to be given to the *Paramount* case. The entire record before Judge Murphy on defendants' motion for summary judgment and plaintiff's motion for pre-trial rulings on the *Paramount* case documents, therefore, are submitted as Appendix C to this petition. Excerpts are printed for the Court's convenience as Appendix B.

independently produced films are concerned, the government charged that the conspiracy was effectuated 'by concertedly excluding independently produced films from affiliated theatres'. (Par. 152, Amended and Supplemental Complaint, Paramount case). It becomes entirely clear from a reading of the government's amended and supplemental complaint in the Paramount case that Goldwyn, the present plaintiff, was there alleged to be a 'major producer', or 'one which produces motion pictures for release by a major distributor pursuant to a prior understanding or agreement with such major distributor'. (Par. 15(b), Amended and Supplemental Complaint, Paramount case), and not an 'independent producer' or 'independent distributor', against whom the conspiracies charged by the government in the Paramount case were alleged to be directed. Insofar as the government identified the 'target area' of the conspiracy in its complaint and answers to interrogatories, it is clear that Goldwyn was not within that 'target area', see Karseal Corporation v. Richfield Oil Corporation, 9 Cir., 1955, 221 F. 2d 358, 362, and indeed was charged with being a participant and beneficiary, to some extent at least, in the conspiracies, by reason of his affiliation with United Artists, one of the defendants in the Paramount case, and by his knowledge of and agreement and consent to the distribution practices of the defendants in the Paramount case (Pars. 84, 86, Amended and Supplemental Complaint, Paramount case). In the words of Judge Wyzanski in the Momand case, supra, '* * * in none of the pleadings in those proceedings is there any reference to * * * alleged wrongs directed specifically against * * * this plaintiff * * *.' D. C. Mass. 1942, 43 F. Supp. 996, 1012."

After the trial, and before a decision had been entered, Judge Murphy died. The case was then assigned to Judge Harris and the cause was submitted to him for decision on the record made before Judge Murphy. Judge Harris accepted

Judge Murphy's ruling that the statute of limitations was not tolled and that the judgment in *Paramount* was not admissible. On May 4, 1961, however, Judge Harris filed his opinion holding that petitioners were liable to plaintiff for damages in the amount of $100,000, to be trebeled to $300,000, attorneys' fees in the amount of $100,000, and costs in the amount of $66,507.31. (App. A, 9a-35a). Both sides appealed.

The court below affirmed the judgment of the District Court so far as liability was concerned. As to the petitioners Fox West Coast Theatres Corporation and Fox West Coast Agency Corporation the judgment, except certain costs allowed by Judge Harris, stands affirmed as entered because neither was a party to the *Paramount* case. So far as the petitioners Twentieth Century-Fox and National are concerned, the court below held that liability had been established for the three year period covered by the evidence and that the amount of damages would be affirmed for that period. It also held that Judge Murphy had erred in holding that Goldwyn's claim was not based upon any matter complained of in *Paramount*. It therefore held that the statute of limitations was suspended from July 20, 1938, to the date the complaint was filed, and that defendants had waived application of the one-year statute of limitations by securing a summary judgment based on the three-year statute. The court below also indicated that the *Paramount* case judgment and certain findings and conclusions would be admissible. The court thus affirmed the judgments of the District Court in part, reversed in part, and sent the case back for further proceedings as to the petitioners Twentieth Century-Fox and National Theatres. Those are the rulings of the court below as to which petitioners seek review here.

Prior to discussing the reasons why the writ should be granted, we note the following concerning the status of Samuel Goldwyn, his position in the motion picture industry, and his own relationships with the other defendants in the *Paramount* case.

Mr. Goldwyn has been connected with the motion picture industry almost from its beginning. He was one of the first producers. In May, 1924, he gave his name to a company which became known as Metro-Goldwyn-Mayer, Inc., when Goldwyn Pictures Corp. was merged with Metro Pictures. Subsequently, in 1925, Goldwyn became affiliated with United Artists Corporation as a part owner. When the petition in *Paramount* was filed Goldwyn owned one-fifth of the stock of the defendant United Artists and distributed his pictures through that company. From and after 1941, Goldwyn's pictures were distributed through RKO, one of the major integrated defendants in *Paramount*. We consider here the allegations of the complaint, the pre-trial statements of the Government and the evidence relating to the Goldwyn pictures which was introduced by the Government at the trial of the *Paramount* case.

A. The Petition and Amended Complaint in *Paramount*

In support of its motion for summary judgment dismissing all claims which had accrued prior to May 16, 1947, and in opposition to plaintiff's motion for rulings on the *Paramount* case judgment, defendants submitted the affidavit of John F. Caskey. Mr. Caskey had been trial counsel for Twentieth Century-Fox and National Theatres during the trial and other proceedings in the *Paramount* case. With his affidavit Mr. Caskey attached exhibits A to R, which exhibits consisted of original documents in *Paramount*. This material is printed in Appendix C and each document is identified there by its *Paramount* case title. Goldwyn's material is also included in Appendix C.

Since Appendix C itself is quite lengthy, petitioners have included as Appendix B excerpts from the documents contained in Appendix C and parts of the Caskey affidavit. Those excerpts relate particularly to Goldwyn. Appendix B follows the opinions of the courts below in Appendix A.

The *Paramount* case was in the nature of a judicial survey of all phases of the motion picture industry. It can not be doubted that the action was commenced for the primary purpose of affording "independents", that is, non-affiliated, non-circuit exhibitors and non-affiliated producers and distributors relief from illegal restraints imposed upon them by the defendants and those affiliated with the defendants.

The petition in *Paramount* named Goldwyn as a defendant. He was by definition a "major producer", that is, one who distributed his pictures through one of the major distributor defendants. He was excluded by definition from any class of independents (App. B, 2b-3b).

In Bills of Particulars filed by the Government, the United Artists (Goldwyn's company) defendants were charged with acting in concert and pursuant to agreements with the other defendants (App. C, 263c, 267c).

On November 14, 1940, the Government filed an amended and supplemental complaint which replaced the petition. The same eight groups of companies were continued as defendants, although the officers and directors of each were dropped as defendants. At that time, Goldwyn was still distributing pictures through United Artists and was identified as one of the owners of that company (App. B, 4b). Again, Goldwyn was by definition a major producer, one which produced motion pictures for release by a major distributor pursuant to a prior understanding with such distributor. He was excluded again from any class of "independents".

(B) The Government's Statements in Pre-Trial Proceedings in *Paramount*

During the course of pre-trial proceedings in Paramount, the Government further clarified the nature of its claims and its complaint with respect to Goldwyn. Those proceedings demonstrate that Goldwyn's claim could not be based in whole or in part upon any matter complained of by the Government.

We point to them as removing any possible doubt that the complaint, on its face, was directed *at*, and not in favor of, Goldwyn and his practices.

1). Numerous Interrogatories were propounded by the defendants and answered by the Government. Those Interrogatories are identified in the Caskey affidavit. In one such answer, the Government listed 540 exhibition agreements as containing facts relied upon to establish its charges. Among those agreements were many relating to Goldwyn pictures (App. B, 5b).*

2). In answer to other Interrogatories which related to the charge that certain defendants had attempted to monopolize or had monopolized first run exhibitions, the Government listed 500 additional documents as supporting its charge. Again, many contracts for Goldwyn pictures with affiliated theatres were listed (App. B, 7b). These documents plainly show that the Goldwyn pictures were ones which had access to affiliated theatres and were part and parcel of the alleged conspiracy. Unlike the Government's complaint with respect to independent producers, Goldwyn's pictures were never excluded from the affiliated theatre market. In the Government's eyes, Goldwyn plainly was not an independent.

3). In certain other Interrogatories, the Government was called upon to identify any of the so-called "independent producers" which had been excluded from defendants' theatres. In two sets of answers, the Government listed numerous persons as independent producers who had been excluded from the affiliated market. In neither set of answers did the name Goldwyn appear as one who had been excluded from the market (App. C, 317c-44c).

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*It should also be noted that with respect to all agreements for the exhibition of the Goldwyn pictures, Goldwyn had retained and exercised a specific power to approve or reject the agreements negotiated for him by his own company, United Artists, and by RKO.

(C) The Evidence Introduced by the Government Upon the Trial of the *Paramount* Case

At the trial the Government relied upon many activities involving the licensing of the Goldwyn pictures as proof of the actual matters of which it complained. Among others were the following:

1) One trade practice vigorously condemned was the licensing of pictures pursuant to a "master agreement". The Government contended, the Expediting Court so found and this Court affirmed, that such agreements had discriminatory and exclusionary effects upon independent exhibitors. Government Exhibits 199 and 382 were two such master agreements. Exhibit 199 was an agreement between United Artists and a subsidiary of the petitioner National. Four Goldwyn pictures were included in that contract. It reflected the Government's complaint that four of the Goldwyn pictures were distributed as part of the conspiracy of which it complained. That Exhibit was also referred to by the Expediting Court as supporting the Government's charge that the defendants had engaged in a price-fixing conspiracy. Government's Exhibit 382 was a master agreement between United Artists and Warner Bros. Circuit Management Corporation (App. C, 372c-76c). Five Goldwyn pictures were included in that agreement. The condemnation of such master agreements by the Expediting Court is to be found in 66 F. Supp. 323, 346-47 and 352. This Court affirmed the Expediting Court's condemnation of all such practices.

2) Another trade practice strongly condemned by the Government in *Paramount* was the licensing of motion pictures pursuant to franchises. A franchise covers more than one motion picture season. Government Exhibit 195 was a ten-year franchise between United Artists and a Paramount exhibiting subsidiary. That franchise related to and included all pictures

produced during the ten-year period by Samuel Goldwyn and other stockholders of United Artists. Goldwyn's consent to the franchise is set out in Exhibit 195 (App. C, 377c-451c).

3) Government Exhibit 142 in *Paramount* (App. C, 452c-81c) is United Artists' answer to Government Interrogatory 48. It showed the result of fourteen pictures distributed by United Artists during the 1936-37 season in New York City, Philadelphia, Atlanta and Kansas City. Three Goldwyn pictures were set forth in that exhibit. It showed that Goldwyn pictures had full access to affiliated theatres in those cities, and that the distribution of those pictures was a part of the conspiracy complained of.

4) Formula deals were a trade practice carried on by RKO and Paramount. It is undisputed that during the period of time involved in the trial of the *Paramount* case at least seven Goldwyn pictures were licensed by RKO, with Goldwyn's approval, to National's subsidiaries pursuant to formula deals. The Expediting Court said (66 F. Supp. 323, 347):

> "Formula deals have been entered into by Paramount and by RKO with independent and affiliated circuits. By such agreements a particular circuit has been licensed to exhibit a certain feature in all its theatres at a specified percentage of the national gross receipts realized from that feature by all theatres in the United States. The circuit may allocate playing time and film rentals among the various theatres as it sees fit. See Plaintiff's Exhibits 241, 419A, 419B. Arrangements whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for the picture in their several areas, seriously and as we hold unreasonably restrain competition. These formula deals have been negotiated without, so far as we are informed, any competition on the part of independent theatre owners who would labor under a great disadvantage in attempt-

ing severally to match or outbid the offers of a circuit that was making offers for all of its theatres."

5) Finally, Government Exhibit 93 showed the results obtained by RKO for the pictures distributed by it during the 1943-44 motion picture season. RKO was the operator of a large circuit of theatres as well as being both a producer and a distributor. This exhibit dealt with RKO's business as a distributor and showed the film rentals received by it for all pictures distributed during the 1943-44 season. Exhibit 93 shows that for UP IN ARMS, a Goldwyn picture, RKO obtained more money in film rental than any other picture distributed by RKO that season. Another Goldwyn picture NORTH STAR was RKO's fourth highest-grossing picture. The first seven pictures were these:

Picture	Billings	Total Rental
UP IN ARMS (Goldwyn)	10,149	$2,751,693
LADY TAKES A CHANCE (Ross) ...	13,987	1,955,781
TENDER COMRADE (RKO)	11,733	1,825,300
NORTH STAR (Goldwyn)	10,141	1,759,419
SHOW BUSINESS (RKO)	11,780	1,703,990
GOVERNMENT GIRL (RKO)	12,507	1,628,005
STEP LIVELY (RKO)	10,286	1,347,557

The foregoing shows that under the decision of the court below it would be possible for Goldwyn to assert claims for damages for alleged inadequate film rentals for these very same Goldwyn produced and RKO- and United Artists-distributed pictures. And yet it was the distribution practices pertaining to these same pictures to which the Government pointed as demonstrating the unlawful conduct of which it had complained and the benefits to those who were participants in such conduct.

It is thus the petitioners' claim here that the foregoing documents, taken in conjunction with the specific allegations of

the Government's complaint, establish that Goldwyn was a party complained *against* in *Paramount;* that the Government was not complaining of any matters resulting in any damage to Goldwyn or his pictures; and that the court below plainly misconceived and misinterpreted Section 5 of the Clayton Act in holding that that statute could be availed of by Goldwyn in the circumstances here present.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The importance of the questions here submitted for resolution by this Court is, we believe, evident in the questions themselves. As we have indicated, and shall later show, the answers of the court below are in conflict with the decisions of other circuits. This Court should resolve those conflicts. This is particularly true where, as here, the questions presented involve important considerations of public policy.

If it is to be held—as the court below held—that a defendant in an antecedent Government anti-trust proceeding may take advantage of his own wrongdoing by claiming the benefits of Section 5 of the Clayton Act in a subsequent action against his co-conspirators, we have reached a status in the law never contemplated by Congress in enacting the anti-trust laws or by those courts which have denied a law violator any profit from his own misdeeds.

It is obvious that Goldwyn shares the same status so far as the Government's complaint is concerned as United Artists and RKO. If they were defendants against whom the Government complained, as indeed they were; then the same complaint must necessarily attach to Goldwyn and Goldwyn's pictures. No subtleties of reasoning can disassociate Goldwyn from his distributors, United Artists and RKO, and his absolute control over the distribution policies of his pictures.

Consider United Artists. It was a distributor only (App. B, 2b). Its whole business was dependent upon the pictures produced for distribution by its five owners, one of whom was Goldwyn. Without those pictures United Artists had nothing to sell to any exhibitor, affiliated or independent. RKO was a fully integrated company but its distribution business was largely dependent upon outside producers, such as Goldwyn, with whom it had distribution contracts.

We do not think any court would take seriously a claim by United Artists or RKO that it was entitled to the benefits of Section 5 of the Clayton Act if it brought an action against the petitioners here. And yet we have substantially the same situation in this action by Goldwyn. He was a charged participant in and beneficiary of the conspiracy alleged in *Paramount*. His action here is against two of his co-conspirators and fellow participants. This is the same conspiracy and Goldwyn's participation in it continued throughout the entire time the *Paramount* case was pending.

Goldwyn does not stand in the position of one who had at one time participated in an unlawful conspiracy but who had withdrawn and then, after his withdrawal, brought an action against some of the defendants for injuries inflicted after he withdrew. The activities of which the Government complained in *Paramount* were the very activities in which Goldwyn participated both directly and through his agents and from which he reaped benefits to the found injury of independent exhibitors.

This Court set the permissible bounds for use, by a private plaintiff, of a judgment or decree entered in an antecedent Government action in *Emich Motors* v. *General Motors*, 340 U. S. 558, but it has not had occasion to consider for the guidance of the lower courts any of the questions posed in this petition. Unless this Court does resolve the conflict which exists between the court below and the other circuits on each

of the questions here presented, co-conspirators and, indeed, defendants themselves in Government actions may reap windfalls, as has Goldwyn up to this point, stemming from their own unlawful conduct.*

In addition to the foregoing, a substantial question of estoppel and waiver exists with respect to the applicable statute of limitations. The decision below that petitioners had waived application of the one-year California statute because they had obtained a summary judgment based on the three-year statute raises a substantial question of law and of public policy that should be settled by this Court. The decision below on that question is in conflict with decisions on the identical question by the Courts of Appeal for the Second and Seventh Circuits.

I. May One Who Is Charged with Being a Participant in and Beneficiary of a Conspiracy in an Antecedent Government Action Rely upon such Government Action, under Section 5 of the Clayton Act, to Suspend the Statute of Limitations in a Private Right Action?

Section 5 of the Clayton Act provides, as pertinent here, that in a private right action

> "... the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof."

Thus, the question here was whether Goldwyn's claim was actually based in whole or in part on any matter complained of by the Government in *Paramount*. In an earlier decision, the court below had laid down the rules for determining that question. *Steiner* v. *20th Century-Fox Film Corporation*, 232

*The flood of cases following the Philadelphia indictments in the electrical equipment industry gives some indication of what could happen.

F. 2d 190 (9th Cir. 1956). The court was then composed of Circuit Judges Stephens and Chambers and District Judge McLaughlin. There the court said (p. 196):

> "The same means must be used to achieve the same objectives of the same conspiracies by the same defendants."

And, further (p. 196):

> "The tolling provision cannot be extended to matters which might have been but were not complained of by the United States. It is restricted to matters actually complained of. The general rules of collateral estoppel apply."

And, in summary, the court made the rule explicit, saying (p. 198):

> "(c) The same means must be used to achieve the same conspiracy by the same defendants in order to toll the running of the statute of limitations under 15 U. S. C. A. § 16."

Further, in the *Steiner* case, the court below explicitly noted that it was not enough for a private plaintiff to allege the same conspiracy. It said (p. 196):

> "General allegations of conduct in violation of the anti-trust laws unrelated to the same conduct alleged in a public suit are insufficient to toll the running of a statute of limitations. A greater similarity is needed than that the same conspiracies are alleged."

In line with the above principles, the determinative matters were the following: What was the actual nature of the conspiracy complained of by the Government in *Paramount*? Who were the parties comprising the conspiracy? What was the objective of the conspiracy complained of? At whom was it directed, that is, what class did the Government claim was damaged by the defendants' activities?

Judge Murphy made those determinations. His holdings on these points were explicit and incontrovertible. He said (App. A, 5a):

> "A comparison of the essence of the complaint in the Paramount case with the essence of the complaint of plaintiff here discloses two substantially different conspiracies, by different sets of conspirators, for quite different objectives, and employing in large part different means."

He then compared the complaint filed by Goldwyn with the amended complaint in *Paramount* and concluded (App. A, 6a):

> "The essence of the Goldwyn complaint now before the court is a conspiracy, participated in by two of the Paramount defendants, but also by others *not* parties to the Paramount case or the conspiracies there charged unreasonably to restrain trade in the motion picture industry which has had the effect of damaging him by depressing the film rentals which he might have obtained from defendants in a free and competitive market.
>
> "Enough has been said to show that the tests of the Steiner case, supra, are not satisfied by the Goldwyn complaint."

These were the controlling considerations leading to Judge Murphy's conclusions which have been quoted on pages 9 and 10 above.

In the case at bar, the court below (now composed of Circuit Judges Pope, Hamley and Browning) made none of the determinations prescribed by it in *Steiner*. Instead, it held (App. A, 86a-87a):

> "But, in any event, the tolling statute does not require, and the *Steiner* test does not provide, that all matters complained of in the private action must find a counterpart in the Government action. The private

> action is only required to be based in part on a matter complained of in the Government suit. The Goldwyn action is based at least in part on an alleged combination and monopoly between Twentieth Century Fox and National having the objective of monopolizing the business of exhibiting motion pictures, such objective being attained by the acquisition and operation of moving picture theatres.
>
> "Building on this foundation, plaintiff alleges that this combination and conspiracy has prevented it, as a non-theatre-owning producer, from licensing its pictures to those theatres on fair and reasonable terms. The foundation allegations, which are a substantial and critical part of the Goldwyn case, as so analyzed, related to a combination and monopoly which, in our view, finds substantial similarity in that part of the amended *Paramount* complaint to which reference has been made."

The court's error becomes manifest from a consideration of the language set out above. The court appears to be saying that because, of the twelve defendants alleged by Goldwyn to have conspired to damage him, two were also charged with conspiracy and monopoly in *Paramount*, plaintiff had established that his complaint was based "in part" upon matters complained of by the Government. That construction is untenable because it is contrary to the plain language of the statute. Goldwyn's complaint was not directed "in part" or in any other way against the two defendants common to both *Paramount* and this case. Goldwyn's only charge in this case is that all the defendants—not some or a part—did the acts alleged to have injured him.

If a Government complaint charges a conspiracy between A and B and a private suit charges that B, C and D were parties to a conspiracy, it is true that B was a party to or a "part" of both conspiracies. That factor, however, is unimportant. Common participation by one or two parties to two

conspiracies having no other factor in common, of purpose or of membership, does not and can not make the conspiracies the same or mean that one is based "in part" upon the other. The crux of any conspiracy is its mutually agreed upon purposes and objectives. It is well settled that mere similarity of method in carrying out separate and distinct conspiracies by similar conspiratorial methods does not convert those separate and distinct conspiracies into a single over-all conspiracy, even where there is a partial over-lapping of the membership of such conspiracies. *Kotteakos* v. *United States*, 328 U. S. 750; *Terry* v. *United States*, 7 F. 2d 28 (9th Cir. 1925); *Tinsley* v. *United States*, 43 F. 2d 890 (8th Cir. 1930); *Marcante* v. *United States*, 49 F. 2d 156 (10th Cir. 1931); *Asgill* v. *United States*, 60 F. 2d 780, 785 (4th Cir. 1932); *Craig* v. *United States*, 81 F. 2d 816 (9th Cir. 1936), *cert. den.* 298 U. S. 690, *reh. den.* 299 U. S. 620.

This particular bench of the court below, moreover, equated Goldwyn as "a non-theatre-owning producer" with an "independent" producer within the definitions of the *Paramount* complaint. This was also manifest error. In *Paramount* an independent producer was defined as one who was not a major producer. A major producer was defined as one who produces pictures for release through a major distributor. Goldwyn was always by definition a major producer. That fact can not be controverted. Theatre ownership has nothing to do with whether a producer is or was a "major" or an "independent". Under the decision by the court below, however, Goldwyn would stand as an independent despite the express definitions by the Government which excluded him from that category.

Both Mr. Goldwyn and the court below relied upon paragraph 170 of the *Paramount* amended complaint which alleged that each producer-exhibitor-defendant*—here Twen-

*RKO Radio Pictures, Inc., Goldwyn's distributor and agent, was also a producer-exhibitor defendant.

tieth Century-Fox and National—was a separate combination which violated Sections 1 and 2 of the Sherman Act by specified conduct. In this way the court sought to demonstrate that Goldwyn's complaint was based at least in part upon some matter complained of in *Paramount*. But the court ignored the fact that paragraph 170 is but one paragraph of eight in Section D of the complaint, that it ends with a colon and that the violations referred to in that paragraph were explicitly spelled out in paragraphs 171-77 as having been aimed at "independent producers", "independent distributors" and "unaffiliated exhibitors". Goldwyn falls into none of those categories or definitions. Even the local monopoly of the "business of exhibiting motion pictures" alleged in paragraph 174 was aimed at "unaffiliated exhibitors", not at affiliated producers such as Goldwyn. Because the *Goldwyn* complaint used some language similar to that in the *Paramount* complaint, the court below seemed to think that that fact was sufficient to bring Goldwyn within the ambit of Section 5 of the Clayton Act. To by-pass its holding in *Steiner*, the court said (App. A, 83a-84a):

> "One of the objectives of this combination and monopoly, according to paragraphs 16(a), 17(a) and 18(a) of the Goldwyn complaint, is to monopolize the business of exhibiting motion pictures. According to the same paragraphs, the means utilized to achieve that objective included the acquisition and maintenance of a monopolistic combine of theatres for the exhibition of motion pictures. Twentieth Century Fox and National, being named defendants in the Goldwyn complaint, were alleged participants in the alleged combination and monopoly referred to above.
>
> "Comparing the described combinations and monopolies with their respective objectives, means of accomplishment and participants, as set forth in the amended *Paramount* complaint, and in the Goldwyn case, it would seem that all of the similarities are present which are required to meet the *Steiner* test."

This obviously could not be a correct interpretation of the law or of the court's own decision in *Steiner*. If it were, a mere parroting of language in a Government complaint would give a defendant in the Government action the benefit of Section 5. This is plainly not the intendment of Section 5.

Quite apart from this, Goldwyn's complaint nowhere charges any activity on the part of the *Paramount* case defendants, that is, all the defendants, with any conduct which injured him. Nor does he charge any separate unlawful conduct by the only *Paramount* case defendants in the case before this Court—Twentieth Century-Fox and National. None of his complaint is based in whole or in part upon the Government's complaint in *Paramount*.

Goldwyn's complaint throughout is predicated upon alleged unlawful activities by "the defendants" and it is simply to the effect that he was forced to accept inadequate film rentals from "the defendants" be ause of the conspiracy and monopoly of "the defendants". Who are "the defendants"? National and Twentieth Century-Fox were defendants in *Paramount* but the other defendants here were not, namely, two subsidiaries of National, National's president and the McNeil and Naify defendants—two individuals and five corporations. Entirely aside from the fact that Goldwyn himself was so involved in *Paramount* that he could not possibly claim the benefits of Section 5 of the Clayton Act, the addition of these ten non-*Paramount* case defendants was an additional factor which was fatal to any claim that Goldwyn's complaint was or could have been based in whole or in part on any matter complained of in *Paramount*. The Government made no complaint of any sort against those ten non-*Paramount* case defendants which make up ten-twelfths of "the defendants" here.

We must also note, and most importantly, that shortly after the decision sought to be reviewed here, another bench of the court below in another case involving the tolling effects of Section 5 of the Clayton Act reached a result directly op-

posite to that in the case at bar. Less than three weeks after the re-hearing was denied in this case, the Ninth Circuit (composed of Circuit Judges Barnes and Jertberg and District Judge Burke) on April 2, 1964, announced its decision in *Marc D. Leh* v. *General Petroleum Corporation, et al.*, (No. 18,333). Plaintiff in that case also relied upon an antecedent Government action to toll the statute of limitations under Section 5 of the Clayton Act. The District Court (Judge William C. Mathes) had held that the applicable statute of limitations was the one-year California statute and that the plaintiff's claim was not based in whole or in part upon the antecedent Government action. 208 F. Supp. 289 (S. D. Cal. 1962).* After referring to the decision of the court below in *Steiner*, Judge Mathes said (pp. 294-95):

> "Applying these criteria, it is clear from comparison of the two cases that pendency of the Government's action in United States v. Standard Oil Company, et al., supra, Civil No. 11584-C, did not operate to suspend the statute of limitations in the case at bar. For in No. 11584-C the Government's charges were directed against an alleged agreement and combination among major oil companies intent upon eliminating competition among themselves, *inter alia*, by controlling prices and the production of petroleum products among independent producers and distributors; whereas, plaintiffs' claim at bar rests, not upon an alleged agreement by the defendant companies to control, but upon an alleged combination to exclude plaintiffs from wholesale gasoline distribution in the Southern California area.
>
> "* * * Furthermore, the defendants in both cases are not the same: Shell Oil Company and the Conservation Committee of California Oil Producers were joined

*The decision by Judge Mathes in *Leh* was rendered while this case was on appeal. The decision of the court below in affirming Judge Mathes is also contrary to the decision at bar on the applicable statute of limitations of California.

as defendants in No. 11584-C, but not in the action at bar, and Olympic Refining Company was originally joined as a defendant in this case, but not in No. 11584-C. [Cf. Momand v. Universal Film Exchange, supra, 43 F. Supp. at 1011.]"

In affirming Judge Mathes's decision, the Court of Appeals, F. 2d , referred to the Government case and then went on to affirm the holding that the one-year statute applied. With respect to the tolling provisions of Section 5 of the Clayton Act, the court re-affirmed its decision in *Steiner* and said (Opinion, pp. 21-22):*

> "Nor do we think the trial court erred in holding the statute of limitations was not tolled during the pendency of the action entitled *United States* v. *Standard Oil Co. of California,* Civil No. 11584-C.
>
> "From *Steiner* v. *20th Century Fox Film Corp., supra,* this court has already held:
>
> (a) The general rules of collateral estoppel apply. 'The tolling provision cannot be extended to matters which *might* have been but were not complained of by the United States.' (232 F. 2d at 196.)
>
> (b) What is contained in the two suits is determined by a comparison of the two complaints.
>
> (c) '[T]he matters complained of in the private proceeding must be the same acts to achieve the same conspiracy complained of in the action brought by the United States. . . . The same means must be used to achieve the same objectives of the same conspiracies by the same defendants. . . .' There must be 'substantial identity of subject matter.'
>
> "None of these tests are met. (Compare Tr. pp. 2 to 24 and Tr. pp. 1136 to 1158.) For example, the

*The opinion had not been reported when this petition was printed. The citation will be filed with the Clerk of this Court when the opinion is reported.

> defendants in the government suit were seven integrated oil companies and the Conservation Committee of California Oil Producers. Neither Shell Oil Company nor the Committee were involved in the instant action. As a second example, the conspiracy in the instant case allegedly started in 1948 and continued into 1954. In the government case, the alleged conspiracy commenced in 1936 and was concerned exclusively with events taking place prior to May of 1950. Thus, there were not only different overt acts charged, but different conspiracies, occurring at different times, between different parties."

It is obvious that the decision of the court below in this case and the decisions of the same court in the *Steiner* and *Leh* cases can not be reconciled. In *Steiner,* plaintiff was the owner of an unaffiliated, independent theatre named the Larchmont. The defendants there were two of the *Paramount* case defendants, the same Twentieth Century-Fox and National which are defendants here, as well as four non-*Paramount* defendants, two of which were subsidiaries of National. The other two defendants were a husband and wife who had at one time leased the Larchmont theatre. The statute of limitations was not tolled in *Steiner.*

In *Leh,* plaintiff was an independent oil distributor. The defendants were six major integrated oil producers which had been defendants in the Government case. In fact, all but two of the eight defendants in the Government case were defendants in *Leh.* The court below held that the statute was not tolled as to Mr. Leh.

In this case, however, Goldwyn was, by definition, not an "independent" but a major affiliated producer of motion pictures. He named only one of the *Paramount* case groups of defendants as defendants here. He also named ten non-*Paramount* case defendants as defendants here. The court below held that the statute of limitations was tolled for Goldwyn.

There is thus a plain conflict within the court below, the result depending upon the composition of the particular bench hearing the case. Mrs. Steiner and Mr. Leh, although clearly members of a class for whose benefit the Government suits were instituted, were held not to be entitled to the benefits of Section 5. Goldwyn, on the other hand, although not a member of any such class, but otherwise situated in an almost parallel position, was held entitled to those benefits.

The decision here is also in conflict with decisions of the other circuits. In *Steiner*, the Ninth Circuit relied upon the decision of the First Circuit in *Momand* v. *Universal Films Exchanges*, 172 F. 2d 37, 48 (1st Cir. 1948), *cert. den.* 336 U. S. 967 (1949). In that case, plaintiff brought suit against the eight principal distributors of motion pictures to recover treble damages alleged to have been sustained in the operation of numerous theatres in Oklahoma as a result of defendants' violations of the anti-trust laws. Defendants pleaded the Massachusetts six-year statute-of limitations and plaintiff relied upon Section 5 of the Clayton Act to toll the statute. With respect to certain of the Government proceedings relied upon by plaintiff, Judge Wyzanski in the District Court said (43 F. Supp. 996, 1012):

> "The proceedings against the Fox and Warner interests under Section 7 of the Clayton Act, 15 U. S. C. A. § 18, (fdgs. 38 and 39) have so remote a connection with the matters here complained of that I conclude they do not toll the statute. * * * * None of the plaintiff's assignors was a producer or distributor and they were remotely, if at all, interested in the matters alleged in the proceedings referred to in findings 38 and 39.
>
> "* * * In none of the pleadings in those proceedings is there any reference to alleged wrongs in Oklahoma or alleged wrongs directed specifically against the assignors of this plaintiff. In at least one case the proceedings are not only remote in place but also in time, having begun after this suit was begun."

So here. The *Paramount* complaint was concerned with practices directed against independent producers and distributors and exhibitors not affiliated with the defendants in that case. That is not and can not be the substance of Goldwyn's complaint. Further, to use the language of *Momand,* "In none of the pleadings in those proceedings [here, *Paramount*] is there any reference to . . . alleged wrongs directed specifically against . . . this plaintiff", that is, Goldwyn.

The holding below in this case is also in conflict with the decision of the Second Circuit in *Dipson Theatres* v. *Buffalo Theatres,* 190 F. 2d 951 (2nd Cir. 1951), *cert. den.* 342 U. S. 926. In that case, Judge Augustus N. Hand, who wrote the opinions of the Expediting Court in the *Paramount* case, considered the effect of the adjudications in that case upon claims asserted by private plaintiffs. In his opinion, Judge Hand referred to the fact that the parties charged as conspirators in the private case were different from those charged as conspirators in the *Paramount* case, saying (p. 958):

> "The fact that plaintiff now concedes that Columbia and Universal were not partie to the present conspiracy and concededly Shea and McFaul were not parties to the original Paramount action also indicates that that case is not controlling here."

The logic of the decisions in the *Dipson, Steiner* and *Leh* cases is self-evident. If the defendants are different, then the conspiracies are necessarily different. And the purposes and objectives of the different conspiracies must neeessarily be different. See cases cited, *supra,* page 24.

The purposes and objectives of the conspiracy alleged by Goldwyn were to pay him inadequate film rentals for the pictures exhibited by the defendants here. That is not the *Paramount* case conspiracy and Goldwyn can not, by self-serving declarations in his pleadings or by copying the language of *Paramount,* or by pointing to one facet of the broad conspiracy

alleged in *Paramount*, convert himself into a person at whom the defendants' activities in the *Paramount* case were aimed.

Since there is substantially no identity of the defendants in this case with those in *Paramount* the statute of limitations was not and could not have been tolled, Goldwyn's complaint is not and could not be based upon any matter complained of by the Government in the *Paramount* case.

Finally, the misconceptions of the court below as to the meaning, purpose and applicability of Section 5 are most strikingly summed up in the last sentence of the court's opinion. It there said (App. A, 102a):

> "It need only be added that, in our view, the fact that at an early stage of the *Paramount* case, Samuel Goldwyn, as an individual, was named as a defendant and co-conspirator, has nothing whatever to do with the applicability of section 5 in the Goldwyn case."

We submit that this statement can only be read as saying that one who is a participant in and beneficiary of a conspiracy of which the Government complains is nevertheless entitled to have resort to the Government case and all the benefits of Section 5 in an action against some of his co-conspirators. Such a conclusion does violence to the Congressional intendment in enacting Section 5. This interpretation is not only novel but indefensible. A review and correction of that interpretation by this Court constitutes a sufficient reason, standing alone, for granting the petition here prayed.

II. May One Who Is Charged with Being a Participant in and Beneficiary of a Conspiracy in an Antecedent Government Action Claim as Plaintiff in a Private Right Action the Benefits of Section 5 of the Clayton Act when He Offers a Final Decree in a Government Action as Prima Facie Evidence?

The court below, once it had concluded that Section 5 tolled the statute of limitations, seems to have assumed that

certain material offered by plaintiff from the *Paramount* case became automatically admissible. While we agree that the two provisions of Section 5 must be read together, one provision is not necessarily dependent upon the other. It is obvious that the statute of limitations could be tolled and yet the judgment would not be admissible if a trial resulted in favor of the defendants. And even when it is held that the statute was tolled the court must still examine the Government case and holdings to determine if any judgment entered in such an action would constitute an estoppel if the Government were substituted as plaintiff in the private action. The considerations discussed under the first question are pertinent, therefore, in considering the admissibility of the *Paramount* case material offered by plaintiff. Goldwyn's status as a *Paramount* case defendant and as a participant in and beneficiary of the conspiracy there found are of the utmost importance in considering the admissibility of the judgment entered in that case.

The court below did not, in so many words, reverse Judge Murphy's decision as to "the admissibility of the decree in the Paramount case pursuant to another provision of Section 5 of the Clayton Act" (App. A, 6a-7a). As pertinent here, Section 5 provides:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."

The court below accepted Goldwyn's version of what Judge Murphy had decided, namely, that he "on October 3, 1956, entered an order holding that the judgments, findings of fact and decrees in the *Paramount* case were inadmissible in evi-

dence in this case." (App. A, 99a). Judge Murphy, however, said nothing of the findings and conclusions. He followed the words of Section 5 of the Clayton Act and the decision of this Court in *Emich Motors* v. *General Motors*, 340 U. S. 558, in holding that "the decree in the *Paramount* case is therefore not admissible" (App. A, 8a).

Emich is the controlling authority from this Court on the question whether a decree in an antecedent Government action is admissible as *prima facie* evidence in a private right action. In that case, the defendants had been convicted of a conspiracy which forced franchised Chevrolet dealers to use General Motors Acceptance Corporation as their finance agency. Emich was a dealer whose franchise had been cancelled because he refused to use the Acceptance Corporation and, instead, used his own finance company. The trial court refused to admit the record in the Government action but did admit the indictment, verdict and judgment of conviction. The jury was charged that the judgment was *prima facie* evidence that the defendants were guilty as charged in the indictment. The Court of Appeals reversed, holding that it was improper to exhibit the indictment to the jury. This Court affirmed the result arrived at by the Court of Appeals, holding that the trial court should have examined the record in the Government case to determine which, if any, of the issues raised by the indictment were actually determined by the judgment and that the court should have charged the jury accordingly. This Court said (p. 568):

> "By its terms, however, § 5 makes a prior final judgment or decree in favor of the United States available to a private suitor as prima facie evidence of 'all matters respecting which' the judgment 'would be an estoppel' between the defendants and the United States. We think that Congress intended to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit.

> "The evidentiary use which may be made under § 5 of the prior conviction of respondents is thus to be determined by reference to the general doctrine of estoppel."

And, further, (p. 569):

> "Such estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution."

The principles of law announced by this Court in *Emich* are based upon the doctrine of collateral estoppel or estoppel by judgment and have been often and variously stated by this Court. See, for example, *Cromwell* v. *County of Sac*, 94 U. S. 351; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371; *Southern Pacific Railr'd* v. *United States*, 168 U. S. 1, 52; *United States* v. *Moser*, 266 U. S. 236, 241; *Lawlor* v. *National Screen Service*, 349 U. S. 322, 326; *U. S.* v. *International Building Co.*, 345 U. S. 502, 504; and *Partmar Corp.* v. *Paramount Corp.*, 347 U. S. 89, 102-03.

Judge Murphy compared the *Paramount* judgment with Goldwyn's complaint to determine if anything involved in this case had been "distinctly put in issue and directly determined" in *Paramount*, concluding that there was none and that the judgment in that case was not admissible.

The court below, however, misconstrued the decision of this Court in *Emich*. It seemed to think that—because certain findings of fact and conclusions of law in *Paramount* would be an estoppel as against Twentieth Century-Fox and National in a subsequent action against them by the United States on those same issues—plaintiff was entitled to the same estoppel although its private right case was entirely different. The court said (App. A, 101a):

> "But the *Paramount* case was tried to the court without a jury and detailed findings of fact and conclusions of law were made and obtained finality when

> thereafter sustained on appeal. As to each of these findings of fact and conclusions of law, Twentieth Century Fox and National would be estopped in any subsequent action against them by the Government. Plaintiff was accordingly entitled, under section 5, to introduce in evidence any of the *Paramount findings and conclusions which were adverse to Twentieth Century Fox or National*, and which are *relevant* to any of the issues in the Goldwyn case, *as prima facie evidence supporting plaintiff's position on those issues.*" (Emphasis supplied)

This holding was clearly erroneous. Obviously both Twentieth Century-Fox and National would be estopped by the findings of fact and conclusions in a subsequent Government suit on the same issues. That, however, is not the test. The test is whether Twentieth Century-Fox and National would be estopped to litigate the claims asserted by Goldwyn if the United States instead of Goldwyn were plaintiff in this case. Nothing could be clearer than the fact that no claim involving any alleged damage to Samuel Goldwyn with respect to any picture produced by him was distinctly put in issue or directly determined in the *Paramount* case. Nor did the Government assert or put in issue for determination any claim that the defendants here conspired to pay Goldwyn inadequate film rentals. Clearly no estoppel arose as to any issue raised by Goldwyn's complaint here.

The decision which most clearly points up the error of the court below is *Eagle Lion Studios* v. *Loew's, Inc.*, 141 F. Supp. 658 (S. D. N. Y. 1956), affirmed, 248 F. 2d 438 (2nd Cir. 1957), affirmed, 358 U. S. 100. In that case the plaintiff Eagle Lion Studios was an "independent" producer and distributor as those terms were defined in the *Paramount* complaint. The action was brought against all eight of the *Paramount* case defendants, including the RKO and Loew's circuits of theatres. When the case came on for trial, six of the distributors were

dismissed because money damages were not sought from them. The complaint, however, charged all the *Paramount* case defendants with conspiring against plaintiff. The defendants RKO and Loew's had been found in *Paramount* to have conspired to suppress competition between them in the New York City market for the pictures distributed by the defendants in *Paramount*.* Plaintiff in *Eagle Lion* claimed, as does Goldwyn, that it had been discriminated against and had received inadequate film rentals. The District Court defined the issue as follows (141 F. Supp. 658, 660):

> "1. Did the defendants combine and conspire in violation of the anti-trust laws of the United States to exclude the plaintiffs from the opportunity of licensing on a competitive basis their feature motion pictures to Loew and RKO theatres which exhibit feature motion pictures in the New York metropolitan area on runs subsequent to first run Broadway?"

That was precisely the issue tendered by Goldwyn. The District Court held that the *Paramount* findings and decrees were not relevant and that the specific findings as to RKO and Loew's would not constitute an estoppel if the Government had been plaintiff instead of *Eagle Lion*.

The principal question on appeal was whether the District Court had erred in its construction of the *Paramount* judgment. In affirming, the Second Circuit held that the *Paramount* judgment did not create an estoppel and that no matter complained of by *Eagle Lion* had been distinctly put in issue and directly determined in *Paramount* (248 F. 2d 438, 443-4):

> "The appellants contend that the construction they argue for is the only reasonable inference to be drawn from the Paramount finding and conclusion quoted above. In so doing, however, they misconceive the

*The findings against RKO and Loew's with respect to their division of the New York City market were the only specific findings of a local conspiracy in the *Paramount* case.

> import and applicability of section 5. In determining, under that section, the effect of a judgment in a prior anti-trust suit it is not our function to consider inferences, whether reasonable ones or not, that might be drawn from the language of the prior judgment. Under section 5 a judgment in a prior suit is *prima facie* evidence 'as to all matters respecting which said judgment * * * would be an *estoppel as between the parties thereto* * * *' (Emphasis added.) Thus, in construing a prior judgment for purposes of this statute, the court in the subsequent action does not sit as a trier of fact, *i.e.*, it does not have wide license to draw inferences from the judgment and record in the prior litigation."

Pointing out that the court was circumscribed by the relatively narrow limits of the doctrine of estoppel and quoting the principles of law set out above from *Emich*, the court continued (p. 444):

> "Subsequent to the Emich decision, this court stated in Monticello Tobacco Co. v. American Tobacco Co., 2 Cir., 1952, 197 F. 2d 629, 631-632 (per Judge Clark):
>
> > '* * * whatever is crucial to the treble-damage case and is not *distinctly determined* in the previous government suit must be proven by direct evidence. Dipson Theatres v. Buffalo Theatres, 2 Cir., 190 F. 2d 951, 958, certiorari denied 342 U. S. 926, 72 S. Ct. 363 [96 L. Ed. 691]. Section 5 does not permit a haphazard use of a criminal judgment merely for its aura of guilt, or 'to imply new wrongdoing from past wrongdoing.' Hastie, C. J., dissenting in Milgram v. Loew's, Inc., 3 Cir., 192 F. 2d 579, 595. See also Note, 65 Harv. L. Rev. 1400, 1404-1407. (Emphasis added)."

In both *Goldwyn* and *Eagle Lion*, the basis of the complaint was payment by the defendants of inadequate film rentals. *Eagle Lion*, however, presented a far more persuasive case for admissibility than *Goldwyn*. For, unlike Goldwyn, the

plaintiff Eagle Lion Studios was by definition an "independent" as that term was used in *Paramount*, an "independent" against whom the alleged predatory and discriminatory activities of the defendants were directed. Eagle Lion Studios had no connection by stock ownership or by contract or otherwise with the *Paramount* case defendants. Moreover, unlike this *Goldwyn* case, all the *Paramount* defendants were named as defendants and the six distributors which were dismissed remained charged as co-conspirators. There were no non-*Paramount* case defendants in *Eagle Lion*. In addition there were specific findings in *Paramount* with respect to local restraints in New York by the defendants RKO and Loew's. The courts, nevertheless held that there was nothing in the *Paramount* case which was distinctly put in issue and directly determined which would have constituted an estoppel in *Eagle Lion* if the United States had been substituted as plaintiff. The final judgment in *Paramount* was not admissible.

The decision of the Second Circuit in *Eagle Lion* and its significance as a precedent here was extensively briefed in the court below. Yet, inexplicably, the court below chose to ignore it completely. At no place in its opinion is there any recognition that *Eagle Lion* exists.

Not only is the decision in *Eagle Lion* by the Second Circuit in direct conflict with the decision of the court below in this *Goldwyn* case, but *Eagle Lion* reflects the prevailing view in other circuits as well. *Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F. 2d 629 (2nd Cir. 1952), *cert. den.* 344 U. S. 875; *Paramount Film Distributing Corp.* v. *Village Theatre*, 228 F. 2d 721 (10th Cir. 1956); *Park Neponset Corporation* v. *Smith*, 258 F. 2d 452 (1st Cir. 1958); and *Buckhead Theatre Company* v. *Atlanta Enterprises, Inc.*, 327 F. 2d 365 (5th Cir. 1964).

In the *Park Neponset* case, for example, there were 16 defendants, eight of which had been defendants in the *Paramount* case. Among the other eight non-*Paramount* case defendants

were two individuals who were members of a local partnership operating the Norwood Theatre in Norwood, Massachusetts. Plaintiff operated a theatre in East Walpole, Massachusetts. The District Court refused plaintiff's offer of the findings of fact, conclusions of law and decrees entered against six of the defendants in the *Paramount* case. In affirming, the Court of Appeals said (p. 456):

> "While plaintiff alleged that the Norwood Theatre was able to exert undue influence upon the distributors and receive its favorable clearance because it was a member of an independent theatre circuit, there is not the slightest evidence of the exertion of this power through master contracts and franchises. In any event, the Paramount decrees are irrelevant to a subsequent conspiracy between the operators of the Norwood Theatre and the distributors as the former were not parties to those decrees. Thus viewed in the context of the evidence presented by the plaintiff, the district judge's exclusion of the Paramount decrees was not error."

Finally, as we have indicated in Point I above, the Second Circuit in *Dipson Theatres* v. *Buffalo Theatres*, 190 F. 2d 951, also held that the plaintiff there could not have benefit of the judgment in *Paramount* because the parties in the private right action were not the same as in the Government action. The parties here obviously are not the same. The judgment in *Paramount* does not and could not constitute *prima facie* evidence of any matter in this case.

III. Did Petitioners Waive the California One-Year Statute of Limitations, although Pleading it as a Partial Defense, because the District Court Had Previously Granted Petitioners' Motion for Summary Judgment Based on the Three-Year Statute?

Defendants' motion in the District Court for partial summary judgment dismissing certain of plaintiff's claims as barred by the California statutes of limitations was made in

June, 1956.* Defendants had pleaded in their answer the bar of both the California one-year statute and the California three-year statute. In June, 1956, it was assumed by lawyers and judges alike that the applicable statute was the three-year statute, Section 338(1) of the California Code of Civil Procedure, rather than the one-year statute, Section 340(1) of the California Code. There had never been a flat holding by any of the District Courts of California or by the Ninth Circuit itself with respect to the applicable statute. The Ninth Circuit, however, had had before it three cases in which all parties and the court had assumed that the statute was three years: See *Burnham Chemical Co.* v. *Borax Consolidated,* 170 F. 2d 569, *Suckow Borax Mines Consol.* v. *Borax Consolidated,* 185 F. 2d 196, and *Steiner* v. *20th Century-Fox Film Corporation,* 232 F. 2d 190.** The petitioners' motion was based upon the foregoing decisions of the Ninth Circuit, although at no time did petitioners concede that the one-year California statute was not applicable.

Judge Murphy's decision granting summary judgment was thus based upon the California three-year statute.

After this case had been tried before Judge Murphy and had been decided by Judge Harris upon the record made before Judge Murphy, and while defendants' appeal was pending in the court below, Judge William C. Mathes in the Southern District of California rendered his decision in *Leh* v. *General Petroleum Corp.,* 208 F. Supp. 289 (S. D. Calif. 1962), to which we have previously adverted. After an exhaustive consideration of the California state court decisions he determined

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*The complaint in this action was filed on May 16, 1950. It alleged claims for inadequate film rentals with respect to the twenty-seven Goldwyn-produced pictures going back as far as 1937.

**In none of the cases before the Ninth Circuit was the time period —one or three years—a material factor in the court's decision. And, as we have pointed out, two of the defendants here were parties defendant in *Steiner* when the court indicated that the three-year statute applied in anti-trust actions.

that the applicable statute in private anti-trust actions was the California one-year statute. This was the first direct holding by any Federal Court in California with respect to the applicable statute. Leh appealed. That appeal was argued six months before the hearing of the appeal in this case.

Defendants in their briefs on appeal in the court below directed the attention of the court to Judge Mathes' decision in *Leh* and to the fact that the decision was *sub judice* before the court below. Defendants further urged that if the District Court's decision in *Leh* was affirmed, it was applicable and available to the defendants in this *Goldwyn* case. Defendants further directed the attention of the court below to authorities holding that, under the circumstances here present, there had been no waiver of the point by the defendants and that they were not estopped to raise it.

It was not until ten weeks after the decision here and three weeks after the petition for a re-hearing was denied that the Court of Appeals below affirmed Judge Mathes's decision. Thus, it is now authoritatively established that the applicable California statute in treble damage actions is the one-year statute. F. 2d

The court below nevertheless held that defendants had waived and abandoned the one-year statute by making their motion for summary judgment based on the three-year statute (App. A, 78a-79a):

> "We do not agree. If defendants had urged such a view in the district court they would be in a position to assert it here, even if it involved an overruling of our decision in *Steiner*. But having invited the asserted error which they contend results from application of the three-year statute, defendants are not now in court on that issue. The view just stated, which is applicable with regard to appellate adjudication generally, is especially applicable with regard to a defense, such as the statute of limitations, which is waived unless asserted.

> "In order to preserve the point for review defendants were not required to request a finding of fact or conclusion of law dealing with the one-year statute. As defendants point out, Rule 52(a), Federal Rules of Civil Procedure, dispensed with the necessity for such requests in order to preserve a point for review. But defendants were required to adhere to the defense of the one-year statute which they advanced in their answer, so that the court would be obliged to rule thereon. Instead, defendants in effect abandoned that defense, as a result of which there was no ruling upon it. The whole trial was had on the theory, asserted by defendants in their motion for partial summary judgment, that the three-year statute is applicable."

This decision by the court below is in direct conflict with two decisions by the Second and Seventh Circuits. *Bertha Building Corp.* v. *National Theatres Corp.*, 269 F. 2d 785, 787 (2nd Cir. 1959), *cert. den.* 361 U. S. 960, and *Emich Motors Corp.* v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956).

In *Bertha Building*, defendant pleaded as bars to the action the statute of limitations of the State of New York, where the action was commenced, and of California, where the cause of action arose. If the defendant could have been sued in California, from July 4, 1935, to July 20, 1938, plaintiff's cause would have been barred by both the one-year and the three-year statute of limitations of California. If the New York statute was the three-year statute the action also would have been barred in New York. For purposes of the case, however, it was conceded that the three-year California and the six-year New York statutes applied. The New York decisions had uniformly indicated that the New York statute was six years. It was immaterial which New York statute applied if defendant could have been sued in California. The District Court held that the action was barred by the three-year statute of California. On the appeal, the Court of Appeals reversed the decision on the ground that plaintiff was entitled to a jury

trial on the question whether defendant could have been sued in California during the relevant period. 248 F. 2d 833. Shortly after that decision, District Judge Levet in the Southern District of New York ruled that the New York three-year statute applied to an action for treble damages under the antitrust laws. The defendant then moved for summary judgment dismissing the complaint as barred by the three-year New York statute.* District Judge Zavatt in the Eastern District of New York, however, held that defendant was estopped by the law of the case from asserting that the three-year statute applied. The case was certified to the Court of Appeals for the Second Circuit. That court held that defendant had not waived the right to assert that the applicable statute was three years instead of six years, saying (269 F. 2d 785, 787-88):

> "The question presented is really whether defendant is precluded by waiver and estoppel from contending that the action is barred by the three year New York statute of limitations. This question involves the public policy against piecemeal litigation and the timeliness of the motion. The problem is sometimes described as governed by 'the law of the case.' It was so described in *Sorensen* v. *Pyrate Corporation*, 9 Cir. 65 F. 2d 982, 984-5. Judge Zavatt cited that case in support of his conclusion that 'The defendant should not now be permitted to ground a motion for summary judgment upon a contention which might have been presented, and which is contrary to its concession upon the trial and the appeal.' The *Sorensen* case is distinguishable. There, after trial on the merits and an appeal, in which the judgment was reversed and the cause remanded for determination of the plaintiff's damages, the defendant tried to plead that the contract was void because of the plaintiff's fraud—a defense which

*In another action the Court of Appeals had held as a matter of law that the defendant could have been sued in New York for more than three years prior to July 20, 1938.

> might have been raised when the case was tried on the merits. The court held that the law of the case precluded the tardy presentation of such factual defense. Here, defendant's motion raises a question of law only which, if sustained, would prevent the necessity of a jury trial on the suability of defendant in California as well as any litigation on the merits of plaintiff's cause. Under the particular circumstances of this case, we do not think that the defendant should be estopped. Cf. *Emich* v. *General Motors Corp.*, 7 Cir., 229 F. 2d 714, 718. Plaintiff has cited no authority for estopping a party from raising a question of law under such circumstances."

The same conclusion was reached in the *Emich* case when it was remanded. Defendant there moved to amend its answer to plead as a defense the two-year Illinois statute of limitations. Leave to amend was granted by the District Court. 15 F. R. D. 354 (N. D. Ill. 1953). The action had been filed in 1941. At that time it was generally thought that the applicable statute of limitations was five years. No statute of limitations was pleaded as a bar to recovery. After the trial and appeals in *Emich*, the Seventh Circuit in a momentous decision held that the applicable statute of limitations of Illinois for treble damage actions was the two-year statute. *Hoskins Coal & Dock Corp.* v. *Truax Traer Coal Co.*, 191 F. 2d 912 (7th Cir. 1951), *cert. den.* 342 U. S. 947. The two-year statute barred Emich's claim. After leave to amend had been granted, defendant moved for and was granted a summary judgment dismissing Emich's claim. On the appeal, 229 F. 2d 714 (7th Cir. 1956), Emich advanced the precise claim advanced by Goldwyn below. The court stated that claim to be (p. 716):

> "In this court plaintiffs insist that defendants by their omission to plead the statute of limitations prior to the first trial waived and relinquished that plea for all time, and that it was, therefore, not within the discretion of the District Judge to permit the plea."

In rejecting plaintiff's claim that the defendant had waived the two-year statute by not pleading it, the court said (p. 718):

> "The plaintiffs also argue on this point that defendants' excuse for not having sooner pleaded the two year statute of limitations was insufficient; that defendants were not entitled to rely on two decisions of the United States District Court for the Northern District of Illinois, Eastern Division, which had held that the Illinois five year statute of limitations was applicable to an action for treble damages under the anti-trust laws. It is conceded that there was no decision either of the Supreme Court or of this court holding the two year statute applicable prior to our decision in Hoskins Coal & Dock Corp. v. Truax Traer Coal Co., 7 Cir., 191 F. 2d 912. The Supreme Court denied certiorari in that case on March 3, 1952. Thereafter the defendants filed their motion to amend their answer by adding the defense of the two year statute of limitations. Under such circumstances we cannot say that the action of the trial judge in permitting the defendants to amend their answer was clearly erroneous and therefore amounted to an abuse of discretion."

It is thus apparent that the decision by the court below that defendants had abandoned the one-year statute is in direct conflict with the decision of the Second Circuit in *Bertha Building* and with the Seventh Circuit in *Emich*. Indeed, unlike *Emich*, petitioners here did plead the one-year California statute as a partial defense. And they made no concession for the purpose of the case or otherwise, as in *Bertha Building*, that only the three-year statute applied. They should not now be barred from having the benefit of the one-year statute because they relied upon what was then thought by bench and bar alike to be the applicable law. This Court should now resolve the conflict between the court below and the Second and Seventh Circuits.

IV. May a Participant in and Beneficiary of a Conspiracy in an Antecedent Government Action Recover against His Alleged Co-Conspirators?

We have heretofore noted Goldwyn's position with respect to the claims of the Government in the *Paramount* case. We here direct particular attention to his relations with the two defendants in *Paramount*, which acted as his distributing agents.

As we have said, Goldwyn was a one-fifth owner of the defendant United Artists Corporation until March, 1941, when he became affiliated with another *Paramount* case defendant, RKO Radio Pictures, Inc., under a written contract of agency for the distribution of pictures produced by him. In all his distribution contracts with United Artists and RKO, Goldwyn retained ultimate control over the sales and distribution policies of the pictures produced by him. His contract with United Artists of July 22, 1936, provided (Clerk's Transcript, 137):

> "(c) The Producer reserves the right to control and determine the sales and distribution policy to apply and govern its own photoplays, and to direct the Distributor to license the exhibition of its own photoplays with each exhibitor, upon such terms and conditions as to the Producer may seem fit.
>
> "(d) The Distributor agrees not to enter into any franchise agreement for any theatre or group of theatres, or for any territory or country without the written consent of the Producer first obtained."

Similar provisions vesting ultimate control over the Goldwyn pictures in *Goldwyn* were contained in all his contracts with United Artists and RKO for the distribution of his pictures. No license agreement solicited by either United Artists or RKO could become final until approved by Goldwyn. These

distributors acted as Goldwyn's sole agents for the collection of film rentals and shared such rentals with Goldwyn. United Artists, for example, received twenty-five per cent of the film rental and RKO from seventeen and one-half to twenty per cent.

The acts of United Artists and RKO in distributing the Goldwyn pictures were, in fact, the acts of Goldwyn as principal. He is chargeable with those acts to the same extent as would be his agents. So far as the *Paramount* case is concerned, Goldwyn was in complete privity with United Artists and RKO in the licensing of his pictures. This conclusion is inevitable. It is based upon established princples of the law of agency and conspiracy which are set forth in the following cases: *United States* v. *Gooding,* 12 Wheat. (25 U. S.) 460, 469; *United States* v. *The Brig Burdett,* 9 Pet. (34 U. S.) 682, 683; *Hoffman* v. *Hancock Mut. Life Ins. Co.,* 92 U. S. 161; *United States* v. *American Column & Lumber Co.,* 263 Fed. 147 (W. D. Tenn. 1920), *affirmed* 257 U. S. 377; *American Tobacco Co.* v. *United States,* 147 F. 2d 93 (6th Cir. 1944), *affirmed* 328 U. S. 781; *Dextone Co.* v. *Building Trades Counsel,* 60 F. 2d 47 (2nd Cir. 1932); *Giusti* v. *Pyrotechnic Industries,* 156 F. 2d 351 (9th Cir. 1946), *cert. den.* 329 U. S. 787. These principles of law were not modified by Section 5 of the Clayton Act.

Goldwyn necessarily stands in the same position as United Artists and RKO in bringing this action. The questions are these: If RKO, a major *Paramount* case defendant, sued another *Paramount* defendant charging violation of the anti-trust laws, could RKO assert that its claim was based on matters complained of by the Government in Paramount and thus maintain a suit against its co-conspirators even to the extent of claiming the benefits of Section 5 of the Clayton Act? If RKO, a producer and distributor which also operated a large circuit of theatres and which was directly involved as

a defendant in every phase of the *Paramount* case, were substituted as plaintiff here, instead of Goldwyn, could there be any question but that RKO would be barred from maintaining such an action, to say nothing of having recourse to Section 5?

These questions would seem to be rhetorical but the court below held, as we have noted above at page 32, that Goldwyn could maintain his suit against two of the *Paramount* case defendants and that he could have the benefit of Section 5, saying that the fact Goldwyn had been a defendant in *Paramount* "has nothing whatever to do with the applicability of section 5 in the *Goldwyn* case." (App. A, 102a).

Incredible as it may seem the court below also assumed that RKO, against whom (with Loew's) more specific findings of violations of the anti-trust laws were made in the *Paramount* case than against any other producer-exhibitor-distributor, had been subjected to pressure and economic duress by the petitioners here and that Goldwyn's relationship with RKO did not preclude him from maintaining this action. The decision on this point is in conflict with decisions of at least three of the other circuits.

A person who has been a party to or a participant in a conspiracy to effectuate an unlawful end or purpose may not in subsequent litigation have any larger rights than his co-conspirators would have against him—indeed, no rights at all. In *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F. 2d 967 (7th Cir. 1943), *cert. den.* 321 U. S. 792, plaintiff sued to recover damages for violations of the Sherman Act. The defendants had previously been indicted and convicted for violations of the Sherman Act in the Western District of Wisconsin, which conviction was affirmed in *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150. Plaintiff relied upon the judgment of conviction in the Government case as a basis for recovery. At the close of plaintiff's evidence, defendants moved for a directed verdict upon two grounds, (1) that plain-

tiff had failed to prove damages and (2) that plaintiff had participated in the unlawful conspiracy. The trial court granted defendants' motion upon the first ground and found it unnecessary to pass upon the second. On appeal, however, the Court of Appeals, in affirming, considered the second ground saying (p. 971):

> "It was not necessary for the District Court to pass upon the further question raised, nor is it essential here, but we think it not amiss to say that the court would been justified in directing a verdict upon the second ground, namely, that plaintiff participated in the illegal conspiracy. This combination was stamped with disapproval by the Supreme Court in United States v. Socony-Vacuum Oil Co., supra, 310 U. S. at page 221, 60 S. Ct. at page 843, 84 L. Ed. 1129, in these words:
>
> > 'Any combination which tampers with price structures is engaged in an unlawful activity. * * * Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.'
>
> "Having participated in this illegal undertaking, plaintiff may not recover; where parties stand in pari delicto, the law leaves them where it finds them. Maltz v. Sax et al., 7 Cir., 134 F. 2d 2, 5; Eastman Kodak Co. v. Blackmore, 2 Cir. 277 F. 694, 700, 701; Victor Talking Mach. Co. v. Kemeny, 3 Cir., 271 F. 810, 816; Bluefields S. S. Co. Limited v. United Fruit Co., 3 Cir., 243 F. 1, 13; Tilden et al. v. Quaker Oats Co., et al., 7 Cir., 1 F. 2d 160; Bishop v. American Preservers Co., et al. C. C. N. D., Ill., N. D., 105 F. 845; Higgins v. McCrea, 116 U. S. 671, 6 S. Ct. 557, 29 L. Ed. 764; Harriman v. Northern Securities Co., 197 U. S. 244, 296, 25 S. Ct. 493, 49 L. Ed. 739. As said in Victor Talking Mach. Co. v. Kemeny, 3 Cir., 271 F. 810, 816:

> "* * * assuming the business system or combination established by the defendant for the sale of its products was in violation of the Sherman Anti-Trust Law, the plaintiff, having been a part of the system or combination and thereby having participated in the violation of the law, cannot be heard to complain of injury to his business resulting therefrom * * *."

The court considered plaintiff's participation in the price maintenance scheme found unlawful in the Government action, saying (pp. 969-70):

> "Its proof further disclosed that, in the meetings and conferences as a result of which stabilization of prices came about, resulting in increased cost of gasoline, plaintiff's officers participated and cooperated; that they were well advised that the program was intended to establish an increased tank car quotation in order to maintain retail prices in its territory and that plaintiff's officers requested its employees to cooperate with the participants in promoting the plan. The letters written by its officers and the testimony clearly establish that plaintiff was an active agency in working out with defendants and others the scheme of which it now complains and in raising and maintaining prices from which it now claims damage has accrued to it."

It should be noted that of all the trade practices found to be unlawful in *Paramount*, none was more strongly condemned by this Court or the Expediting Court than was the provision in contracts which stipulated the minimum box office prices to be charged by an exhibitor. 334 U. S. 131, 141-44; 66 F. Supp. 323, 334-41. The pictures produced by Goldwyn and distributed for him by RKO and United Artists were licensed to exhibitors under contracts which specified the minimum price to be charged. Indeed, RKO came in for special attention by the Expediting Court in the price fixing phase of the conspiracy found to be unlawful. Also, Govern-

ment's Exhibit 199 (App. C, 345c-71c) was a master agreement between United Artists as a distributor and an indirect subsidiary of National as an exhibitor and covered pictures distributed by United Artists for Goldwyn. With respect to that Exhibit, the Expediting Court said (66 F. Supp. 323, 338):

> "It contained the following clause: 'Where pictures are licensed on a percentage rental basis the scale of admission prices to be not less than the scale of admission prices charged to view pictures of comparable quality exhibited by the exhibitor and distributed by distributors other than United Artists.' The foregoing quotation shows an acquiescence of United Artists in admission prices fixed by any other distributor and an adherence to those prices in its own licenses. Plaintiff's Exhibit 199."

In *Eastman Kodak Co.* v. *Blackmore*, 277 Fed. 694 (2nd Cir. 1921), the defendant had previously been found to have violated the Sherman Act in an antecedent Government action (230 Fed. 522, appeal dismissed, 255 U. S. 578). In the action by the dealer Blackmore, defendant interposed the defense that plaintiff had participated in and was a beneficiary of the alleged unlawful conspiracy. In holding that plaintiff, as a participant in the unlawful acts alleged, could not recover, the court said (pp. 700-01):

> "In brief, assuming that what defendant did in conjunction with others amounted to a conspiracy under the act, and that defendant succeeded in obtaining a monopoly contrary to the act, plaintiff at all times derived the advantages and accepted the benefits which flowed from that conspiracy and that monopoly.
>
> "It is fundamental that in the same conspiracy all participants are conspirators, whether the part they play be great or small. They cannot receive some of the fruits and then be held blameless for other acts which they may not have initiated but whose benefits

> they have received. On the evidence in this case, we are unable to find any act of defendant or of plaintiff which, as matter of law, separates them from each other as participants in the same conspiracy and which frees plaintiff from being in pari delicto with defendant."

The significance of these cases is apparent because in both the *Northwestern Oil* and *Eastman Kodak* cases neither of the respective plaintiffs had been a party to the antecedent Government action at any stage of the proceedings. Goldwyn's participation in the *Paramount* case conspiracy went far beyond the acquiescence of the plaintiffs in *Northwestern Oil* and *Eastman Kodak*. He always controlled the distribution practices relating to the Goldwyn pictures and all contracts were approved by both Goldwyn and his distributing agent, whether RKO or United Artists. Those practices were held by this Court in *Paramount* to have been part of the over-all conspiracy condemned. Plainly, it is not necessary to have been a formal party to the antecedent Government action to be barred from asserting a claim against co-conspirators, participants and fellow beneficiaries.

The decision of the court below is also in conflict with decisions of the Court of Appeals for the Third Circuit in *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 Fed. 1 (3rd Cir. 1917), and *Victor Talking Mach. Co.* v. *Kemeny*, 271 Fed. 810 (3rd Cir. 1921). In the *Bluefield* case, the court stated the law in that Circuit, as follows (p. 18):

> "If the Sherman Act was violated by the combination in which the Bluefields Company participated, and injury to that company was a natural consequence, then the case comes within the well settled principle that where a criminal combination is made or a criminal enterprise is undertaken by two parties and either party violates the agreement with injury to the other, the law will afford the injured party no redress but will

leave him as it finds him. In pari delicto potior est conditio defendantis."

The District Court (Judge Murphy) found as a fact that Goldwyn was involved in the *Paramount* case as a defendant and as a participant and beneficiary to such a degree that he could not avail himself of the benefits of Section 5 of the Clayton Act. It follows that such participation as a defendant and beneficiary of the *Paramount* case conspiracy precludes Goldwyn from maintaining this action.

In this connection, it should also be noted that Goldwyn's affiliation with RKO and United Artists was voluntary. There is no element of economic pressure or coercion that forced Goldwyn to distribute through those companies. As a one-fifth owner of United Artists, Goldwyn could hardly advance that claim and, indeed, he makes no claim that he was forced to distribute his pictures either through United Artists or RKO. There is also no claim that either United Artists or RKO was a victim of the alleged combination and conspiracy among the petitioners here and the McNeil and Naify defendants.

Goldwyn stands in no better position to maintain this action than would RKO or United Artists if either were substituted as plaintiff in Goldwyn's stead. Neither they nor he may take advantage of Section 5 of the Clayton Act or in any other way maintain this suit. The decision below is in conflict with at least three other circuits. This Court should now resolve that conflict.

CONCLUSION

The questions here presented for review by this Court represent deep conflicts between the circuits. Important public policy considerations with respect to the administration of the anti-trust laws are inherent in each of the questions, none of which has been but all of which should be, settled by this Court.

We respectfully submit, therefore, that this Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review and settle the questions here presented.

Respectfully submitted,

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Of Counsel

May 20, 1964

Opinion by Judge Murphy

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 29,756

SAMUEL GOLDWYN PRODUCTIONS, INC.,

Plaintiff,

v.

FOX WEST COAST THEATRES CORPORATION, ET AL.,

Defendants.

ORDER

These are two motions in an anti-trust treble damage action brought by Samuel Goldwyn Productions, Inc. against Twentieth Century-Fox Film Corporation, National Theatres Corporation, Fox West Coast Theatres Corporation and Fox West Coast Agency Corporation (hereafter referred to, respectively, as Twentieth Century-Fox, National, Fox West Coast Theatres, and Fox West Coast Agency). The original suit by the plaintiff named additional defendants for whom a separate trial has been ordered.

This suit was filed on May 16, 1950. The first motion before the court is defendants' motion for a partial summary judgment dismissing all claims which accrued prior to

May 16, 1947 on the ground that they are barred by the applicable statute of limitations. The applicability of the three year statute of limitations of Cal. Code of Civil Procedure, sec. 338(1), see *Steiner* v. *20th Century-Fox*, 232 F. 2d 190, 194 (9th Cir. 1955), to this proceeding is not in issue on this motion, and may be assumed for the purposes of this motion to be undisputed.

Plaintiff argues that the statute of limitations was suspended by virtue of Section 5 of the Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 731, 15 U. S. C. A. sec. 16, which provides:

> "Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the anti-trust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

The prior proceeding by the United States upon which plaintiff relies is *United States* v. *Paramount Pictures, Inc., et al.*, Equity No. 87-273, (hereafter referred to as the *Paramount* case) filed in the United States District Court for the Southern District of New York on July 20, 1938, and not finally terminated until after three years preceding the filing of the complaint in the instant action on May 16, 1950. Of the defendants here, only Twentieth Century-Fox and National were defendants in the Paramount case, and therefore the statute of limitations could, of course, only be suspended as to them. *Momand* v. *Universal Film Ex-*

change, 172 F. 2d 37, 48 (1st Cir. 1948), cert. den. 336 U. S. 967 (1949). The issue before the court on this motion, therefore, is whether the statute of limitations is suspended as to defendants Twentieth Century-Fox and National between July 20, 1938 and May 16, 1947.

The proper application of Section 5 of the Clayton Act has been repeatedly spelled out by the cases. See, e.g., *Momand* v. *Universal Film Exchange*, 43 F. Supp. 996, at 1011, 1013 (D. C. Mass. 1942), aff'd. 172 F. 2d 37 (1st Cir. 1948), cert. den. 336 U. S. 967 (1949). In order for the statute of limitations to be suspended by Section 5 of the Clayotn Act, the party seeking the suspension must in his complaint allege not only the same conspiracy as that alleged by the government in the prior suit, but also the use of the same means to achieve the same objectives by the same defendants. *Steiner* v. *20th Century-Fox Film Corp.*, supra, at 196, 198. In the *Steiner* case the Court of Appeals had occasion to state the rule as follows:

> ". . . The same means must be used to achieve the same conspiracy by the same defendants in order to toll the running of the statute of limitations under 15 U. S. C. A. sec. 16. Whether the statute of limitations bars the action in question may be determined in advance of trial. . . ." (Id. at 198).

The Court then went on to make the point that a mere similarity in some of the means used in pursuance of the conspiracy would not suffice to suspend the statute of limitations. It said:

> ". . . The trial court, after hearing the parties . . . granted the appellees' motion to dismiss, for the matters complained of here are not identical with

those alleged in United States v. Paramount, supra. Appellant did state similar threats of building competing theatres and withholding first-run motion pictures. However, in United States v. Paramount, supra, these threats were allegedly used for different purposes and objectives than in the present case. . . ."

A comparison of the essence of the complaint in the *Paramount* case with the essence of the complaint of plaintiff here discloses two substantially different conspiracies, by different sets of conspirators, for quite different objectives, and employing in large part different means.

The *Paramount* complaint (amended and supplemental complaint, filed November 14, 1940) charged the eight principal motion picture companies with conspiracies unreasonably to restrain and monopolize the production, distribution and exhibition of motion pictures. The allegations relating to the effect of these conspirators upon the industry deal with independent, non-affiliated, producers, distributors, and exhibitors, against whom the conspiracy was directed. So far as independently produced films are concerned, the government charged that the conspiracy was effectuated "by concertedly excluding independently produced films from affiliated theatres". (Par. 152, Amended and Supplemental Complaint, *Paramount* case). It becomes entirely clear from a reading of the government's amended and supplemental complaint in the *Paramount* case that Goldwyn, the present plaintiff, was there alleged to be a "major producer", or "one which produces motion pictures for release by a major distributor pursuant to a prior understanding or agreement with such major distributor". (Par. 15(b), Amended and Supplemental Complaint, *Paramount* Case), and not an "independent producer" or "independent dis-

tributor", against whom the conspiracies charged by the government in the *Paramount* case were alleged to be directed. Insofar as the government identified the "target area" of the conspiracy in its complaint and answers to interrogatories, it is clear that Goldwyn was not within that "target area", see *Karseal Corporation* v. *Richfield Oil Corporation*, 221 F. 2d 358, 362 (9th Cir. 1955), and indeed was charged with being a participant and beneficiary, to some extent at least, in the conspiracies, by reason of his affiliation with United Artists, one of the defendants in the Paramount case, and by his knowledge of and agreement and consent to the distribution practices of the defendants in the *Paramount* case (Pars. 84, 86, Amended and Supplemental Complaint, *Paramount* case). In the words of Judge Wyzanski in the *Momand* case, supra, ". . . in none of the pleadings in those proceedings is there any reference to . . . alleged wrongs directed specifically against . . . this plaintiff. . . ." (43 F. Supp. 996, 1012 (D. C. Mass. 1942).

The essence of the Goldwyn complaint now before the court is a conspiracy, participated in by two of the *Paramount* defendants, but also by others *not* parties to the *Paramount* case or the conspiracies there charged unreasonably to restrain trade in the motion picture industry which has had the effect of damaging him by depressing the film rentals which he might have obtained from defendants in a free and competitive market.

Enough has been said to show that the tests of the *Steiner* case, supra, are not satisfied by the Goldwyn complaint.

The motion of defendants for partial summary judgment is granted.

The second motion before the court is one by plaintiff to determine the admissibility of the decree in the *Para-*

mount case pursuant to another provision of Section 5 of the Clayton Act, supra, which, provides the following:

> "A final judgment or decree . . . rendered in any civil or criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. . . ."

The evidentiary use which may be made of this quoted part of Section 5 has been set out in detail by the Supreme Court in *Emich Motors* v. *General Motors*, 340 U. S. 558 (1951), at pp. 568-569. It is to be determined by reference to the general doctrine of estoppel. Id., at 568. The Court said: "Such estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal proceeding". (Emich, supra, at 569). The considerations adduced above in connection with the tolling of the statute of limitations should suffice to dispose of the estoppel issue as well, since the two parts of Section 5 here in question are to be construed together. See *Sun Theatre Corp.* v. *RKO Radio Pictures*, 213 F. 2d 284, 290 (7th Cir. 1954); *Momand* v. *Universal Film Exchange*, supra. But it may be pertinent to note, additionally, that the *decision* in the *Paramount* case, as distinguished from the *complaint*, was considerably narrower as to the existence of monopolistic restraints on trade, and laid especial stress on the *collective*

power of *all* the defendants in the *Paramount* case to establish the restraints of trade on a nation wide basis only, not a local one. See *U. S.* v. *Paramount*, 334 U. S. 131, at 166-167; 85 F. Supp. 881, 893-4 (District Court, on remand from Supreme Court). In connection herewith, and in view of the different defendants in the instant case from those in the *Paramount* case, it may be pertinent to cite the comment of Judge Augustus N. Hand, the author of the opinion in the lower court in the *Paramount* case, in the case of *Dipson Theatres* v. *Buffalo Theatres*, 190 F. 2d 951 (2d Cir. 1951), cert. den. 342 U. S. 925, where the issue was whether the *Paramount* decree might be used to prove the conspiracy complained of in the *Dipson* case. Judge Hand said:

> "The fact that plaintiff now concedes that Columbia and Universal were not parties to the present conspiracy and concededly Shea and McFaul were not parties to the original Paramount action also indicates that that case is not controlling here." Id. at 958

I find that under the principles of collateral estoppel the matters complained of by Goldwyn here were not "distinctly put in issue and directly determined" in the *Paramount* case, and that the decree in the *Paramount* case is therefore not admissible in the instant proceedings. The motion of plaintiff is denied.

Dated: October 3rd, 1956.

/s/ EDWARD P. MURPHY
United States District Judge

Opinion by Judge Harris

[SAME CAPTION]

MEMORANDUM OPINION AND ORDER

This is an action tried by the Court without a jury wherein the plaintiff seeks treble damages under the anti-trust laws, against Fox West Coast Theatres Corporation, et al. The suit was filed on May 16, 1950, and after extensive pretrial discovery proceeded to trial before the late Judge Edward P. Murphy.

Prior to trial Judge Murphy made several vital and significant rulings, particularly granting defendants' motion for partial summary judgment and dismissing all claims which occurred prior to May 16, 1947, on the ground that they were barred by the applicable statute of limitations.[1] Also, that the decree in the Paramount case[2] was not admissible in the instant proceedings.

The cause proceeded to trial as against Twentieth Century-Fox Film Corporation, National Theatres Corporation, Fox West Coast Theatres Corporation and Fox West Coast Agency Corporation. Plaintiff's original suit had named additional defendants for whom a separate trial was ordered.

The trial was protracted. It commenced on the 10th day of July, 1957, and was concluded on the 14th day of January, 1958. Plaintiff and defendants called twenty-three witnesses. The trial transcript consisted of 6500 pages, ex-

[1]Samuel Goldwyn Productions, Inc. v. Fox West Coast Theatres Corp., et al., 146 F. Supp. 905.

[2]United States v. Paramount Pictures, 334 U. S. 131.

clusive of voluminous exhibits, involving a mass of economic, statistical and accounting data. At the conclusion the trial court requested the parties to prepare findings of fact and conclusions of law. The findings submitted were very extensive. References to them are made herein.

Before decision, Judge Murphy died. The cause was reassigned.

On November 19, 1959, and thereafter, counsel for the parties appeared on a pretrial conference for the express purpose of acquainting this Court with the ramifications of the litigation, the scope of the evidence adduced before the late Judge Murphy and the question whether the cause would be resubmitted on the record or whether witnesses would be called *de novo*.

The Court at the conclusion of the hearing requested additional briefing on the question of "causal relationship" and the issue of impact and continued the matter regularly until February, 1960, for argument on the merits, the Court having decided, upon stipulation of counsel, to have the cause resubmitted on the record of testimony theretofore elicited.

After extensive oral argument counsel requested time to file additional briefs and the matter was finally submitted for decision on the merits on the 1st day of September, 1960. This last submission was set aside by the Court for the reason that counsel for defendants submitted a supplemental brief. Thereafter counsel for plaintiff on the 10th day of April, 1961, filed a responsive brief and the cause is now ready for decision.

The erosive effect of the influences of both pretrial, trial and subsequent court engagements has narrowed the issues presently before the Court. The difficulties attend-

ant upon a decision in this case are not concerned with any complexity or novelty in legal application. The underlying principles have been carefully enunciated by our Circuit Court, as well as the Supreme Court of the United States.[3]

Plaintiff contends that defendants' violations of the Sherman Act and the Clayton Act through the practices charged, have injured plaintiff in its business of producing and distributing motion pictures by reason of the low rentals plaintiff was compelled to accept in the marketing of the specific pictures involved in this litigation.

Defendants deny that the film rentals negotiated by plaintiff's distributor R. K. O., were less than the product itself deserved in each instance. Defendants assert that the present litigation arises because the seller, after disposing of his product, would now like to re-negotiate on a more

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[3] *Restraint and Liability:*

United States v. Paramount Pictures, et al., 334 U. S. 131, 68 S. Ct. 915
United States v. Schine, 334 U. S. 110, 68 S. Ct. 94
United States v. Griffith, 334 U. S. 100, 68 S. Ct. 942;
United States v. Crescent Amusement Co., 323 U. S. 173, 65 S. Ct. 254

Damage:

Eastman Kodak v. Southern Photo Materials Co., 273 U. S. 359, 47 S. Ct. 400
Story Parchment v. Paterson Parchment Paper Co., et al, 282 U. S. 555, 51 S. Ct. 250
Bigelow v. R. K. O., 327 U. S. 251, 66 S. Ct. 574
Mandeville Island Farms v. American Crystal Sugar Co., 334 U. S. 219, 68 S. Ct. 996
Paradise Theatre Corp. v. Fox West Coast, et al, 264 F. 2d 602
Flintkote Co. v. Lysfjord, 246 F. 2d 368
Richfield Oil Co. v. Karseal, 271 F. 2d 709
Continental Ore Co., et al. v. Union Carbide and Carbon Corp., et al, #16,149, March 22, 1961, p. 8 (9th)

profitable basis. They deny a violation of the antitrust laws through conspiracy or monopoly and contend that plaintiff received that to which he was entitled in a competitive market.

Defendants contend that the Goldwyn product had deteriorated and that the pictures were progressively less well received in the market.[4] Also, that the law suit was brought through personal pique.

Defendants further contend that the plaintiff had outlets available other than the National Theatres Corporation (hereafter N. T. C.)[5] representing approximately 600 theatres situated strategically throughout the United States. Also, that Goldwyn "sold away" to certain of his customers and attempted to put pressure on the defendants.

The plaintiff states that the record is clear, that Goldwyn struggled against the practices of the Fox chain from the middle twenties down to date.

It is to be observed that this is not the case of an obscure, lone exhibitor striving to obtain a product on a competitive basis.[6]

Samuel Goldwyn, an outstanding producer of motion pictures and a powerful figure in the industry, came to the market in 1947-50 with seven motion pictures. His bargaining agent and distributor was R.K.O.

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[4]See Beggs' testimony, Tr. 5942: " 'Roseanna McCoy' and 'My Foolish Heart' obviously had a very small exhibition in NTC and on this basis comparison of the playoff results of these two Goldwyn pictures with other features of the same season would be highly questionable."

[5]According to the record, in May 1947 defendant NTC owned, leased or operated through direct and indirect subsidiaries 597 theatres located in 189 incorporated cities. By May 1950 the number of theatres held had decreased to 526, located in 185 incorporated cities.

[6]Carter v. Twentieth Century-Fox, 127 F. Supp. 675.

The pictures ranked among the feature motion pictures shown in the film seasons in which each was respectively released as follows:

Goldwyn Release	Rank
Walter Mitty	16
Bishop's Wife	17
Best Years (reissue)	33
Song is Born	40
Enchantment	80
Roseanna McCoy	47
Foolish Heart	52

THE QUESTION OF LIABILITY:

Plaintiff is required to prove restraint and injurious impact.

The conspiracy as outlined by plaintiff was a many faceted one to violate Sections 1 and 2 of the Sherman Act in gaining monopolistic control in the marketing areas wherein defendants owned or operated theatres. Defendants created local pockets of monopoly and joined therein a national buying combine.[7]

The Joint Alliances and Pools:

The jointly held corporations and enterprises existing between National Theatres Corporation (NTC) and putative competitors were illegal and declared such by the Supreme Court in United States v. Paramount Pictures, 334 U. S. 131, 149, and ordered divested upon the showing that the other parties were potential competitors.[8]

[7]Pltf's proposed findings, pp. 20-28, 3095.

[8]The NTC circuit was divested effective June 7, 1951.

Several of these joint arrangements were in existence during the period involved herein, to-wit: *1947 to 1950.* The impact upon the Goldwyn organization is manifest.

> "These provisions in the decree will stand. The practices were bold efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine."[9]

The Supreme Court in the Paramount case remanded the action for consideration by the District Court. Following the remand, the District Court entered an order based on the consent of the United States and Twentieth Century Fox Film Corporation dated December 17, 1948:

> "1. Plaintiff having claimed and offered evidence that certain corporations are owned jointly by National Theatre Corporation, together with an actual or potential independent exhibitor, said corporation being listed in plaintiff's proposed finding 115; and plaintiff having petitioned this court for the entry of an order requiring National Theatres Corporation to dispose of its joint interest in such corporation in order to terminate such continuing restraints of competition as may arise therefrom."[10]

The final decree of February 8, 1950, prevents the defendants from entering into joint theatre arrangements.[11]

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[9]United States v. Paramount Pictures, 334 U. S. 131, at 149. Cf. Mandeville Island Farms, Inc. v. American Crystal Co., 334 U. S. 219.

[10]Pltf's Ex. 61.

[11]Plft's Ex. 376 for id.

It is difficult, if not impossible, to delineate herein all of the alliances, agreements regarding division and allocation of product, "gentlemanly understandings," "harmonious working arrangements" and collusive conduct that permeate the vast record before the Court. On the question of restraint and impact it is not unfair to say that the orders and decrees in the Paramount case were barely made and entered when Fox set in motion, through its agents, a series of practices and transactions designed to circumvent and avoid the significant teaching of the Paramount case.

Whether these efforts to continue the monopoly were subtle and refined, or bold is of no particular moment. Suffice, that the testimony is replete with instances of conduct reminiscent of the practices condemned and proscribed by our Supreme Court.

Defendants assert that the joint alliances had no unreasonable effect on any defined market.

The following demonstrates to the contrary and is illustrative of the difficulties attendant upon the plaintiff in disposing of his product in a free, competitive market:

(a) Defendants contend that there was a substantial theatre competition in downtown Los Angeles. There were 13 Fox theatres, 2 R. K. O., 2 Franchon Marco-Paramount, 4 Warner Bros., and 3 Blumenfeld.

These asserted substantial competitors were still meeting once a week and allocating motion pictures and products down to the date of trial.[12]

The Lundgren book demonstrates a clear allocation system.[13] Examples of splitting products may be found in

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[12]Tr. pp. 3749-3753; 3761; 3768; Cf. 1917.

[13]Plf's Ex. 11 and 12; Tr. 1860-65, et seq.

San Francisco's Mission district; for Seattle, Spokane, Inglewood, etc., similar practices occurred.[14]

(b) N. T. C. or Fox West Coast did not compete in any city or town within the Naify circuit for many years. Where Fox and Naify operated theatres in the same communities they formed joint ventures or alliances and collusively split products.

Not until after the beginning of the period in this suit was the Fox-Naify combine broken up under the Paramount order of December 20, 1948.

(c) It was Fox's original policy to maintain their exhibition agreements as a secret. Otherwise, it would not be necessary to meet in parked cars on remote hillsides or in quiet offices where the products would be divided by pooling lots or drawing markers out of a hat. This, even since the Paramount decree and the commencement of the instant litigation.[15] However, the defendants contend that the plaintiff knew, or should have known, or consented to the division of products. This is not borne out by the record. Neither is the assertion that the Department of Justice had been informed by Mr. Pirosh of the arrangements. Mr. Marcus, attorney for the Department, gave negative testimony denying such knowledge or implied consent. Mr. Marcus' testimony is believable and true and Pirosh's statements in this respect should be rejected.

(d) Plaintiff contends that the avoidance or elimination on the part of Fox, through N. T. C., of competitive bidding, whenever possible, resulted in a depreciated price

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[14]Tr. 2545-2556.

[15]Tr. 2282.

for the product. This is also borne out by the record.[16] The question of competitive bidding as a compulsory mode of doing business is on debatable ground. Although the District Court in the Paramount case approved this method, the Supreme Court refused to require it, indicating that it would involve the courts in constantly supervising the economics of the industry.

It is fair to observe that the defendants herein advanced before our Court of Appeal in the Paradise case, 264 F. 2d 602, the validity of competitive bidding. In any event the statistical data discloses that in those instances wherein competitive bidding was engaged in the benefits flowing to Goldwyn were appreciable.[17]

(e) Impact is further demonstrated when, as it appears, the plaintiff was obliged to sell the product to the monopolist Fox as a matter of economic necessity. The testimony of Mr. Mulvey is clear and convincing to the effect that plaintiff's alternative was either to do business with defendant's circuit or "stay out and lose a fortune."[18]

Mulvey spent a career of approximately 35 years in the industry. His testimony simply cannot be ignored or treated cavalierly.

The late Judge Murphy was apparently impressed with the basis for Mulvey's conclusions, although the record reflects that Mulvey may not have been familiar with all of the infinite details.

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[16]Defendants' classified pictures (internally) A, B or C, for bargaining purposes with producers and thereby established a rental schedule which made true negotiation on the part of plaintiff a futile gesture. Tr. 2179-84.

[17]Pltf's Ex. 215; Tr. 2212, 2239, 3027, 3546, 5748.

[18]Tr. 4759.

> "The Court. I think his testimony to me is crystal-clear that he took into consideration, not Oakland, particularly, not the situations in such-and-such a place, but the overall picture. I consider his testimony to mean it is all-embracing, he took in all factors, including division of product, including allocation of various things—all of them were joined together and formed his concept which dictated his future activity."[19]

Further, the Court observed that ". . . he (Mulvey) cannot be expected to pinpoint all of these various situations."[20]

The plaintiff had no alternative but that of dealing with defendants largely on their own terms; this is borne out by the testimony of Mr. Mulvey.

Mochrie was obliged to accept Fox's circuit-wide terms and made clear the compulsion exercised upon R. K. O. by N. T. C. He could not obtain the requested percentage terms for the Goldwyn pictures, nor with respect to playing time would Fox give a commitment for any more than ordinary playing time,[21]

> "There is no other form the deal could take, other than flat rental; it took that form. If I had been unable to negotiate a flat rental deal, that was in my opinion better than the percentage deal which I had rejected, the only third recourse was not to sell. I don't know of any other form this deal could have taken.
>
> Mr. Pride: Or sell a competitive theatre?

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[19]Tr. 4487.
[20]Tr. 4680, et seq.
[21]Mochrie deposition, Pltf's Ex. 367, pp. 27, 30, 49, 50, 59, 61, 78.

> The Witness: Well, Mr. Pride, there were very many situations to the best of my knowledge where there were no competitive theatres.
>
> Mr. Pride: Right.
>
> The Witness: If I failed to sell the Fox circuit, there would be, in my opinion, a considerable loss of revenue to the Goldwyn pictures period."[22]

The facts demonstrate that the defendants, although ostensibly bargaining on a competitive basis, refused in the majority of the transactions and situations to purchase other than on their own terms, i.e., a flat rental basis covering the theatres in the circuit or combine as a whole.

Particularly was this so on the second-run houses. Also, they refused guaranteed playing time.

Plaintiff was required to engage R. K. O. as distribution agent on a substantial percentage of total rentals, made necessary by reason of the monopoly control by the Paramount defendants.[23]

R.K.O. admittedly was an energetic bargaining agency and had a substantial stake in the transaction.[24] Nonethe-

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[22]Mochrie deposition, Pltf's 367, p. 112.

[23]Cf. Tr. 4661; 4662. Conant, "Antitrust in the Motion Picture Industry," p. 47: "Nevertheless, control by the five major defendants over key theatres gave them power to exclude other distributors from a large share of the exhibition market. For this reason the independent producer of better quality, more costly pictures had to turn to a member of the combination for distribution in order to secure entry into enough key theatres for revenues to cover his costs."

[24]Conant, p. 80: "Only the few established independent producers with leading stars under contract, as Samuel Goldwyn, could secure distribution through RKO for 17.5 per cent of total rentals. (20% in this case) Other distributors paid 25 per cent. Even Goldwyn was required to pay 25 per cent of gross rentals for distribution of certain English films which he had acquired.

less, plaintiff was caused to earn less total rentals than would be earned in a free competitive market.

When the whole record is considered it is apparent that Goldwyn as a practical matter had to sell to the defendant NTC largely on its terms. Fox did business as a theatre circuit in totality, requiring a producer of films to do business with Fox or lose a fortune.[25] Although the veneer and plausibility of competitive bargaining was seemingly engaged in by NTC, the final decisions were made substantially on their own terms.

On the issue of restraint and impact the record demonstrates that plaintiff has discharged the burden of proof.

The issue of liability having been determined, the question of the amount and extent of the damages suffered by plaintiff shall be determined by the Court on the 15th day of May, 1961.

Findings of fact and conclusions of law may be prepared in accordance with the foregoing opinion and order.

The issue of liability having been heretofore determined by the Court, the questions surrounding the issue of damages may now be discussed and determined.

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[25]Tr. 3536-3537; 3856; 3176-3181; 3982; 3987. The scope of defendants' operations and the power it was able to exercise in its dealings with plaintiff, together with its practices as set forth in some detail, supra (allocations with "competitors"; joint ventures with Naify; secret meetings subsequent to advent of this suit, etc.), establish a mode of conduct proscribed in United States v. Griffith, et al., 334 U. S. 100, and fulfill the requirements for specific intent within the meaning of ##1 and 2 of the Sherman Act. As stated by the court at page 108, ". . . even if we assume that a specific intent to accomplish the result is absent, (defendant) is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what (defendant) did."

DAMAGES

Plaintiff has not claimed that there is any one specific measure of damages applicable herein. Throughout the oral arguments and the briefs, the Court's attention has been directed to the dollar amounts of additional film rental which plaintiff would be entitled to according to different individual measures and theories of damage.

The Court has been urged to consider them all and to make a final determination based upon the application of its informed judgment to all these indicia of the amount of damages.

The mass of accounting and economic data does not permit of mathematical precision in arriving at a just and reasonable amount.[26] All of the subject matter including the expert opinion testimony, must be collated, sifted and weighed by the fact finder to the end that the Court may ultimately make a just and reasonable estimate based on relevant data as to the amount of damage, and render judgment accordingly.

Plaintiff argues: "That there is not in any recorded case under the antitrust laws a plethora of evidence as strong in depth and in extent to support a reasonable inference of damage as is contained in this record."

Although this is an ambitious statement, it may be observed that the record does demonstrate abundant evidence to afford the trier of fact a predicate upon which to measure the damage award.

> "Such damage need not be made patent item by item as on a balance sheet. The mere unlawful combina-

[26]Richfield Oil Corporation v. Karseal Corporation, 271 F. 2d 709, 715.

tion over a period of time to eliminate competition is proof of damage."[27]

The qualification and experience of plaintiff; the state of the industry both before and after the relevant period, as well as during it; the defendants' financial records; financial figures of the pictures involved, and the costs thereof; the rentals received from the Fox defendants and the Naify circuit; the rentals received from other exhibitors; the profits and losses of the pictures to the plaintiff; the profits made by the defendants; a comparison of the licensing of these pictures by competitive bidding as against negotiation; a comparison of the playing time of these pictures in Fox as against non-Fox houses; evidence of the quality or lack of quality of the pictures from the viewpoint of box-office attractiveness; the comparative position of these pictures in relation to other pictures based on national box-office gross; a comparison of competitive bidding results with negotiated results in the Fox situations on the same picture.

Before considering the opinion testimony from the experts and the extra-judicial admissions contained in the record, as well as the claimed damages reflected by the various statistical and accounting studies, it is well to have certain principles in mind emanating from the Supreme Court and the Ninth Circuit:

In Story Parchment Co. v. Paterson Co.,[28] the Court said

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages

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[27]Fox West Coast Theatres v. Paradise Theatre Building Corp., (9th Cir.) 264 F. 2d 602, 608.

[28]282 U. S. 555, 563, 564.

with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

* * * *.

"And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit."

Judge Barnes, in Flintkote Company v. Lysfjord,[29] set forth the controlling rules which are applicable to the case at bar:

"We take it that the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal con-

[29] 246 F. 2d. 368 at 392 (9th).

> nection between defendant's wrongful act and some loss of anticipated revenue. Once that has been accomplished, the jury will be permitted to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' Bigelow v. RKO Radio Pictures, Inc., supra, 327 U. S. at page 264.
>
> "66 S. Ct. at page 580. The cases have drawn a distinction between the quantum of proof necessary to show the fact as distinguished from the amount of damage; the burden as to the former is the more stringent one. In other words, the fact of injury must first be shown before the jury is allowed to estimate the amount of damage."[30]

In determining the fundamental tendencies from the elaborate accounting data, it will simplify our problem if we adopt a summary, the predicate for which may be beyond dispute. Such may be found in the figures of Dr. Beggs of Stanford Research Institute, a witness produced by the defendants.[31]

a. How did NTC treat the Goldwyn pictures in terms of film rental as compared to the treatment accorded the same features by other exhibitors, nationwide?

The following figures are expressed in terms of percentage of film rental paid to gross admissions—which means the number of dollars of box office receipts:

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[30]Eastman Kodak v. Southern Photo Materials Co., 273 U. S. 359; Bigelow v. RKO, 327 U. S. 251; Richfield Oil Co. v. Karseal, 271 F. 2d 709; Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., (9th), No. 15,242, Sept. 30, 1960; Cf. Continental Ore Co., et al v. Union Carbide and Carbon Corp., et al. supra.

[31]Senior Economist, Stanford Research Institute, Menlo Park, California.

Plaintiff's Picture	All non-NTC first-run selected by Beggs including Paramount case defendants	All non-NTC first-run selected by Beggs exclusive of Paramount case defendants	All non-NTC first-run selected by Beggs exclusive of Paramount case defendants and other major circuits	NTC first-run selected by Beggs
The Secret Life of Walter Mitty ...	38.2%	39.9%	41.7%	35.5%
The Bishop's Wife	37.7%	39.0%	41.5%	41.9%
The Best Years of Our Lives (G.R.)	35.3%	36.8%	37.3%	32.4%
A Song is Born ...	34.5%	35.8%	37.1%	30.7%
Enchantment	34.2%	36.7%	38.9%	30.6%

Counsel for plaintiff has provided the Court with a comprehensive compendium based upon the Beggs' work sheets and data, prefaced with the note that they have felt sensitive that the figures they themselves have advanced have been criticized. There can be no dispute as to the reliability of the Beggs' data and its applicability to damages.

Expressed in terms of dollars respecting columns 3, and 4., as above:

	Column 3	Column 4
	All non-NTC first-run selected by Beggs, exclusive of Paramount case defendants and other major circuits (Dollars of film rent per $1000 of gross admissions)	NTC first-run selected by Beggs (Dollars of film rent per $1000 of gross admissions)
The Secret Life of Walter Mitty	$417.00	$355.00
The Bishop's Wife	415.00	419.00
The Best Years of Our Lives (GR) ...	373.00	324.00
A Song is Born	371.00	307.00
Enchantment	389.00	306.00

The basic figures were used by Dr. Beggs in Ex. 197. "Relationship Between Gross Admissions Per Unit and Film Rental Per Unit in Selected Cities of the United States.[32]

The underlying figures embraced in the foregoing table are in turn reflected in defendants' charts determinative of the "line of best fit" depicting through the medium of black and red dots the relationship of film rental per unit to gross admission per unit.[33]

We have, therefore, basic figures which defendants have relied upon. These figures demonstrate that Goldwyn received far less film rental from NTC then he received from other exhibitors, particularly those whose actions were free from monopoly conditions. In terms of comparison the plaintiff received some $62,000 less from NTC for the "Secret Life of Walter Mjtty" than it actually would have received under similar conditions absent the illegal monopoly of NTC; and some $29,000 less from NTC for "Enchantment" than the plaintiff actually received from non-NTC exhibitors under similar circumstances. Again, absent monopoly factors. Plaintiff further points out that the same relative results would be reached with the other pictures depending on the difference shown in the comparison.[34]

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[32]A week of playing time is regarded as consisting of 10 units—each day of the week except Saturday and Sunday is treated as 1 unit; Saturday is treated as 2 units; Sunday is treated as 3 units. Thus, the normal week consists of 10 units. When a general holiday falls in the middle of the week, it is treated as representing 3 units. Such a week thus has a total of 12 units.

[33]Def's Ex. 197.

[34]"In view of the fact that the gross of 'The Secret Life of Walter Mitty' in NTC was $1,006,069 and of 'Enchantment' $359,825. it would follow that if the Court were to use this comparison as the sole and only measure of impact and damages upon plaintiff, plaintiff received some $62,000 less from NTC ($62 per $1000 as pointed out

It is further observed that the foregoing figures used as a predicate are not the complete measure of damages for they do not take into accounting the increase in playing time.

b. There is no dispute concerning the essential facts surrounding the following significant transactions.

In 1945, as the result of complaints by the Distribution Department of Twentieth Century-Fox concerning inadequate film rent from NTC, NTC paid additional film rental of $500,000. This payment was over-all and made to satisfy demands of the distribution department of the parent company.

Also, in 1947 NTC paid Twentieth Century-Fox an additional amount of $500,000 film rental.

The record further discloses that the payment during 1945 was allocated to individual picture film rental. Mr. Lundgren, head of the statistical department, testified that the "distribution department maintained that they were entitled to receive more money—more film rental.[35]

The main dispute centered around the fact that sufficient film rental was not paid: *"They wanted to increase the number of percentage situations; they wanted additional percentage pictures played over and above what were being negotiated for; they wanted adjustments in the flat rental prices."*[36] (This is practically the same plaint made by Goldwyn)

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above) for 'The Secret Life of Walter Mitty' than it actually received under similar conditions, absent the illegal monopoly of NTC, and some $29,000 less from NTC ($83 per $1000) for 'Enchantment' than plaintiff actually received from non-NTC situations under similar circumstances, but again absent the monopoly factor. The same relative results would be reached with the other pictures, depending on the difference shown in the comparison."

[35]Tr. 3365.

[36]Tr. 3557; Cf. Plt's Reply Br. pp. 168-170.

Defendants, although admitting the salient facts, contend that since it owned all of NTC voting stock, NTC could be required to pay whatever amount it chose as film rental and that the matter of how much or little was paid by NTC as film rental to the parent company is no evidence of a standard of conduct as to what should have been paid to an outside distributor.

The defendants' contentions are not valid and are not borne out by the record.

Lundgren testified:

> "During the years that National Theatres Corporation was a subsidiary of Twentieth Century-Fox Film Corporation, at least during the period National was operated by the Skouras brothers, there was an understanding between the distribution department and the exhibition department that to all intents and purposes there would be arms-length negotiations for film, as much as possible—especially in view of the fact that there were certain contractual obligations with individuals that depended partly upon either contract profits or other types of additional compensation."[37]

Traditionally, the bargaining between the NTC divisions and Twentieth Century-Fox was at arm's length and there was as much bargaining and haggling over the terms as there was with other distributors.[38]

In addition, Charles Skouras and other officers enjoyed manager's contracts which provided for compensation based upon the profits of their respective divisions of NTC. It is fairly inferable from the record that these gentlemen were

[37]Tr. 3362; Plt's Br. p. 152.
[38]Rhoden, Pltf's Ex. 198.

not engaged in making gifts to Twentieth Century if it would mean a reduction in their own compensation. It is further inferable from the record that these executives were not engaged in operating an eleemosynary institution.[39]

Mindful of their general pattern of conduct, one would not expect them to deal out two payments of $500,000 each without great intra-mural compulsion.

The 1945 payment of $500,000 was spread over six Twentieth Century-Fox pictures, thus increasing the film rental on these pictures to an average of 35.5 percent.

By parity, plaintiff contends that the same basic arguments therein availed of afford a predicate for an additional film rental in excess of $200,000 spread over five Goldwyn pictures.[40]

Again, although the arithmetical foundation does not have the same nicety of calculation as that contained in a balance sheet or profit and loss statement, nevertheless it does afford a trier of fact sufficient predicate upon which to base a finding within the fair intendment of the applicable authorities.

c. Further evidence of damages suffered by plaintiff may be found in the record under the general heading of competitive bidding. This form of negotiation for pictures developed at the conclusion of the Paramount case and served as a means of assuring competition in the industry. During the three years involved in the present case, competitive bidding occurred not only as to plaintiff's pictures in certain instances, but also as to many of the products of defendants and their rivals.[41]

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[39]Carter v. Twentieth Century-Fox Film Corp., supra.
[40]Plt's Br. p. 156.
[41]See Def's Ex. 215.

While variations occurred from picture to picture and from season to season, the total result of competitive bidding was to assure producers better film rentals and better play-off time.[42] Thus, despite the fact that the gross admissions per unit—a measure of box office attractiveness—during the several years in question were slightly higher (2%) for pictures sold without competitive bidding than for those sold under such procedure, the actual rental per unit for the latter pictures was higher. The percentage of rental was higher under competitive bidding and the playing time was greater.

In the 1947-48 season defendants paid almost 10% more for pictures purchased on a bid basis and allowed those pictures an average of over 3 units more of playing time. Similarly in the 1948-49 season, the average rental paid for bid pictures was two percent higher than for non-bid pictures and the average unit of playing time exceeded that for non-bid pictures by more than three units. Again in the 1949-50 season, competitive bidding and unit of playing time exceeded that for non-bid pictures. For the three seasons, the average increased rental and additional playing time enjoyed by plaintiff under competitive bid situations in negotiations with defendants resulted in 54% greater revenue for pictures leased under competitive terms than for those rented without competitive bidding.[43]

Mr. McIntyre of RKO, plaintiff's agent, testified that defendants refused to make any commitment as to playing

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[42]Tr. 4407, 4408, as supplemented by plaintiff's Exhibits 406 and 407 and analyzed in detailed appendix to plaintiff's brief dealing with individual competitive bidding situations in areas ranging from Compton, Huntington Park, Los Angeles and Inglewood to San Jose, Sacramento and San Francisco. See also, plaintiff's reply brief, opposite p. 127.

[43]Pltf's br. pp. 104-116; Tr. 5749, 5753, 5754, 5796; Beggs testimony through Exh. 215.

time for plaintiff's pictures when he negotiated with them. Contrast this with the situation arising under competition. Defendants' own witnesses conceded that in many situations, competitive bidding led to higher film rentals and more units of playing time. Nor can this be dismissed as "crisis" conduct. As stated above, defendants themselves presented arguments on behalf of competitive bidding before our Court of Appeal in the Paradise case.[44] They pointed out its advantages and its fairness to producers. The scale on which it was utilized during the years covered by this litigation establish its acceptance by the industry.[45] The thread of the arithmetic story told through this media results in the following conclusions which are inevitably drawn from the record:

1. In competitive bidding there is more playing time.
2. In situations of comparable note the rental or license fee was greater.

While defendants may challenge the specific differential between competitive and non-competitive rentals, they cannot dispute the record which establishes that plaintiff would have received substantially higher rentals for its pictures had they been negotiated on a competitive bid basis. Defendants themselves paid more for the same product when they acquired a picture on a competitive basis.[46] As previously stated, plaintiff would have received in excess of 50% additional rental during the period 1947-50 had competitive bidding been available for disposition of its products.[47]

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[44]264 F. 2d 602.

[45]See Exh. 215.

[46]Cf. Tr. 6005, 6109, 6116-18, 6369.

[47]Footnote 43, supra.

Consideration should also be given to the testimony of James Mulvey, the president of plaintiff. Mr. Mulvey spent thirty-five years in the industry in various capacities and also had approximately seven years' experience as a trained accountant. We have already alluded to the fact that Judge Murphy was seemingly impressed with his testimony.

Apart from the interest that the witness would necessarily have in the outcome of the controversy and mindful of the fact that expert opinion testimony is very often ingenious[48] and subject to the pressures of partisanship and employment, nevertheless Mr. Mulvey's testimony is persuasive—again, merely as a base upon which a fact finder could undertake to predicate a reasonable estimate.

Mr. Mulvey's testimony occupied some 700 pages of transcript. He was subjected to lengthy direct and vigorous cross-examination. He testified in finality based upon the Walsh Studies[49] that plaintiff was aggrieved and damaged in the amount of $287,675 as to the five pictures distributed.[50]

Did the plaintiff introduce sufficient relevant economic data from which a court may be able to make an estimate of what the market might have produced absent violation of the antitrust law?

The foregoing general illustrations answer this question in the affirmative. The Court is mindful, however, that the arithmetical observations and conclusions are merely pieces of the general mosaic—not controlling or conclusive as to the specific dollar claim,—and merely serving as elements upon which to predicate the ultimate finding.

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[48]Judge Murphy stated (Tr. 6478): "Dr. Beggs has done everything but the Indian Rope Trick with his figures . . ."

[49]Pltf's Exh. 401.

[50]Pltf's Exh. 385.

d. There are many other facts which are tendered as part of the general accounting picture. Plaintiff has advanced a comparison of "Hans Christian Andersen" (shown in the early '50's) with the results of the pictures released and exhibited during 1947-50.[51]

In addition, plaintiff has advanced other and varied contentions on which damages may be predicated. However, the foregoing transactions, set forth seriatim, are thoroughly grounded in the record and present relevant data upon which reliance may be placed.

In arriving at the amount of damage, it is evident that the result cannot be obtained by applying a formula that would operate with the precision that would ordinarily be encountered in a corporate balance sheet or profit and loss statement.

Realizing the difficulties attendant upon such appraisal, our Court of Appeals in Richfield Oil v. Karseal, supra, at page 714, observed:

> "We do not see much difference between the suggested formula (profits plaintiff would have realized if defendant had marketed product) as an assist in arriving at just and reasonable damages, and a chart placed on a blackboard in a personal injury case, where plaintiff's lawyer outlines his computations as to loss of earnings, pain and suffering, and the various other items of damage. The plaintiff is not required to prove with mathematical certainty the amount of its damage resulting from a defendant's violation of the antitrust laws.

Story Parchment Co. v. Paterson Parchment Co., supra, 282 U. S. at pages 562-563, 51 S. Ct. at page 250, states:

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[51] See testimony of Lundgren, pp. 5496-5498.

> '. . . It is true that there was uncertainty as to the extent of the damages, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain results of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount . . .'
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> . . .
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> Under all the facts in the case the damages must have a reasonable and fair relationship to the type, extent and period of the restraint applied, the number of outlets affected by the restraint and the kind of product, its price and salability, the profit made on sales, and an estimate of the amount of profit lost by reason of the illegal activities of the defendant. There was here proof of such matters."

As we have it in the case at bar the matter is simplified to the extent that the same parity of reasoning may be applied as in a personal injury case. Conceivably, in the absence of specific evidence of a clear and satisfactory character such a rule or formula would resolve the matter into mere guess or speculation. However, the case at bar provides specific references as hereinabove pointed out, as a basis and criterion upon which to predicate and rationalize the quantum of damage suffered. There is no guess work or speculation involved when we have the various elements

and components as carefully and precisely set forth as hereinabove alluded to.

Under the circumstances the sum of $100,000 trebled under Section 4 of the Clayton Act[52] results in a total award of $300,000. This amount equated as to the various elements herein alluded to represents an amount based on relevant data consistent with a fair, just and equitable award. Attorney fees and costs are allowed plaintiff.

DATED: MAY 31st, 1961

/s/ GEORGE B. HARRIS
United States District Judge

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[52]"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Opinion by Judge Hamley

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,725—Jan. 24, 1964

TWENTIETH CENTURY FOX FILM CORPORATION, FOX WEST COAST THEATRES CORPORATION, FOX WEST COAST AGENCY CORPORATION and NATIONAL THEATRES CORPORATION,

Defendant-Appellants,

vs.

SAMUEL GOLDWYN, FRANCIS HOWARD GOLDWYN, SAMUEL GOLDWYN, JR., JAMES A. MULVEY and BEN FISH, doing business as GOLDWYN PRODUCTIONS, a limited partnership,

Plaintiff-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Before: POPE, HAMLEY and BROWNING, Circuit Judges

HAMLEY, Circuit Judge:

This is a suit by a motion picture producer against motion picture exhibitors and their agents to recover damages for, and obtain injunctive relief from, asserted violations of sections 1 and 2 of the Sherman Act.[1] Damages were claimed in the sum of $2,250,000, trebled to $6,750,000. Jurisdiction was asserted under sections 4 and 16 of the Clayton Act.[2]

[1] 26 Stat. 209 (1890), as amended, 50 Stat. 693 (1937), 15 U. S. C. §§ 1, 2 (1958).

[2] 38 Stat. 731, 737 (1914), 15 U. S. C. §§ 15, 26 (1958).

The action was commenced on May 16, 1950, by Samuel Goldwyn Productions, Inc.[3] Nine corporations and three individuals were named defendants. Five of the corporate defendants and two of the individual defendants were granted a separate trial.[4] The third individual defendant, Charles P. Skouras, died on October 22, 1954, and the action was discontinued as to him.

The four defendants remaining in the case for this trial are the so-called "Fox defendants": Twentieth Century Fox Film Corporation (Twentieth Century Fox), National Theatres Corporation (National), Fox West Coast Theatres Corporation (Fox West Coast) and Fox West Coast Agency Corporation (Fox West Coast Agency).

Twentieth Century Fox, the parent corporation in this group,[5] is an integrated producer, distributor and exhibitor

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[3]Prior to entry of the final judgment on September 20, 1961, Samuel Goldwyn, Francis Howard Goldwyn, Samuel Goldwyn, Jr., James A. Mulvey and Ben Fish, doing business as Samuel Goldwyn Productions, a limited partnership, succeeded to the interests of Samuel Goldwyn Productions, Inc. Accordingly, on August 8, 1961, plaintiff moved for a substitution of parties plaintiff to take account of this succession of interests. Such an order was entered on October 13, 1961, nunc pro tunc as of September 20, 1961.

[4]The corporate defendants which were granted a separate trial are United California Theatres, Inc. (United California), and T. & D. Jr. Enterprises, Inc. (T. & D. Jr.) comprising the so-called "McNeil-Naify defendants," Golden State Theatre & Realty Corporation (Golden State), San Francisco Theatres, Inc., and Excelsior Amusement Co., Inc. The McNeil-Naify defendants and Golden State operated the "Naify Circuit." The individual defendants who were granted a separate trial are Michael A. Naify and R. A. McNeil (now deceased), owners and general managers of the Naify Circuit.

[5]All of the stock of Fox West Coast Agency is owned by Fox West Coast. All of the stock of Fox West Coast is owned by National. Prior to May 11, 1943, forty-two per cent of the stock of National was owned by Twentieth Century Fox. After that date, the latter company owned all of the stock of National.

of motion pictures. National, in addition to its control of Fox West Coast, operates motion picture theatres in the middle and far western states through other subsidiary operating corporations. Fox West Coast is engaged in the management and control of theatres in California, Arizona, Montana and Nevada. Fox West Coast Agency is in the business of buying and booking motion picture films for those theatres which are operated directly or indirectly by Fox West Coast.[6] Motion picture theatres operated or controlled by Twentieth Century Fox, National and Fox West Coast comprise the "Fox Circuit."

It was alleged in the complaint that, beginning in 1925 and continuing to the date the action was commenced, defendants and others acting in concert with them unlawfully entered into contracts, combinations and conspiracies to monopolize and restrain trade in the interstate licensing and exhibition of motion pictures, and that they did monopolize and restrain, and attempted to monopolize and restrain such trade. It was alleged, more particularly, that the asserted contracts, combinations and conspiracies dealt with the six kinds of undertakings set out in the margin.[7] The specific objectives of the asserted contracts, combinations and con-

[6]While the trade refers to the "buying" and "selling" of film, the transactions are actually licensing arrangements since the films are copyrighted.

[7]"a. Agreeing to acquire and maintain and acquiring and maintaining a monopolistic combine of first and subsequent run theatres for the exhibition of motion pictures;

"b. Agreeing to eliminate and eliminating competition in the purchase of film licenses;

"c. Agreeing to control and restrain, and controlling and restraining negotiations for the terms and conditions for licensing the exhibition of motion pictures;

"d. Agreeing to allocate and allocating motion picture product among themselves on a non-competitive basis;

spiracies, it was alleged, were to: (a) establish, increase, maintain and perpetuate a monopolistic buying power of motion picture theatres, (b) negotiate for the film licenses on a collective basis, and (c) depreciate film rental paid to producers.

With regard to twenty-eight motion pictures produced by the plaintiff or its predecessor in interest during the period of the asserted contracts, combinations and conspiracies, it was alleged, the violations complained of depreciated the value of the pictures, lessened the fees paid under the licenses, and substantially injured and impaired the good will attaching to the producing company and to the picture.

The answer filed by the Fox defendants consisted of a general denial as to the critical allegations of the complaint, together with eight affirmative defenses including defenses relying on the one- and three-year California statutes of limitations, laches, and the principle of *pari delicto*. Discovery and other pretrial proceedings, interspersed with long periods of inaction insofar as the record reveals, consumed the period from November, 1950 to June, 1956.

On July 12, 1956, the Fox defendants moved for partial summary judgment dismissing plaintiff's claims which had accrued prior to May 16, 1947 on the ground that such claims were barred by the three-year California statute of limitations.[8] This motion was argued before The Honor-

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"e. Agreeing to operate and maintain, and operating and maintaining, a rigid uniform and non-competitive system in the booking and playing of motion pictures; and

"f. Agreeing to establish, fix, decrease, stabilize and depreciate, and actually establishing, fixing, decreasing, stabilizing and depreciating the film rental to be paid producers for the exhibition of motion pictures."

[8]The action was commenced before the enactment of 69 Stat. 283 (1955), adding section 4B to the Clayton Act, 15 U. S. C. § 15b (1958), which new section provides, among other things, a four-year

able Edward P. Murphy, to whom the case had been assigned. On October 3, 1956, Judge Murphy entered an order granting defendants' motion for a partial summary judgment dismissing all claims which accrued proir to May 16, 1947. *Samuel Goldwyn Productions, Inc.* v. *Fox West Coast Theatres Corp.*, N. D. Cal., 146 F. Supp. 905.[9]

The case was tried before Judge Murphy, without a jury, beginning on July 10, 1957 and continuing intermittently until January 14, 1958, when both sides rested. On December 13, 1958, before the cause was argued or submitted, Judge Murphy died. On July 28, 1959, the cause was reassigned to The Honorable George B. Harris for all further proceedings. Pursuant to stipulation, the cause was submitted to Judge Harris for decision on the record before Judge Murphy. The date of final submission was April 10, 1961.

On May 4, 1961, Judge Harris filed his memorandum opinion holding the Fox defendants liable to plaintiff for the injuries caused by what the court found to be defendants' violations of the antitrust laws between May 16, 1947 and May 16, 1950. On May 31, 1961, Judge Harris filed his supplemental opinion holding that plaintiff was entitled to actual damages in the sum of $100,000, to be trebled to $300,000. Attorneys' fees in an amount not then specified were also allowed. These opinions were reported in *Samuel Goldwyn Productions, Inc.* v. *Fox West Coast Theatres*

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statute of limitations for causes of action under section 4 of the Clayton Act. Section 4B also provides that no cause of action barred under then-existing law shall be revived by the 1955 enactment. The three-year California statute of limitations relied upon by defendants in moving for partial summary judgment, is Cal. Cod. Civ. Proc. § 338(1).

[9]Plaintiff applied to this court for leave to file a petition for writ of mandamus or prohibition to review the order of October 3, 1956. On April 11, 1957, we denied the application, our order being unreported.

Corp., N. D. Cal. 184 F. Supp. 507, 513. Attorneys' fees in the amount of $100,000 were thereafter allowed plaintiff.

Findings of fact, conclusions of law and a judgment were entered on September 20, 1961. In the findings of fact the court described how Twentieth Century Fox had acquired its interest in theatres,[10] and depicted in detail the extent of the theatre holdings which evolved.[11] Other theatre groups were described.[12] The procedures were explained under which the licensing of all film used in the Fox Circuit was centralized in National's Los Angeles office.[13] Also described were the methods instituted by National under which it controlled price and playing time for films.[14]

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[10]Through its predecessors, Twentieth Century Fox began acquiring theatres in 1925. In that year it acquired approximately one-third of the common stock of West Coast Theatres, Inc. In March, 1928, it acquired all of the stock of Wesco Corporation which later became National. The latter corporation then owned the stock of various other theatre-operating companies.

[11]National had interests either directly through wholly or partially owned subsidiaries or indirectly by virtue of film buying and other arrangements, in 587 theatres which it operated at the end of 1946, and 531 theatres which it operated in September, 1950. These theatres were located in 189 communities in eighteen states. In addition, National held interests in first run theatres in New York City, Detroit and Philadelphia.

[12]Principal among these were the Naify Circuit, referred to in note 4, comprised of over one hundred theatres during the 1947 to 1950 period; United Artists Theatres of California, Inc.; Principal Theatres, Inc.; Evergreen State Amusement corporation; John Hamrick Theatres; Cascade Theatre Corporation; J. J. Parker Theatres; and the Danz Circuit.

[13]The court found that the buying of films for all theatres in the various groupings in which National had an interest was done entirely by National, except that the buying of films for the Naify Circuit was done by the Naify buying organization with the advice and active collaboration of National, a major stockholder in the Naify Circuit.

[14]In this connection the district court found (findings of fact Nos. 35 and 36):

"'35. National agreed with the different distributors on specific brackets of classification for the distributor's pictures.

In the findings of fact the ways in which National restrained trade and eliminated competition are then detailed at great length. Three principal methods by which this was accomplished are described. The first of these was through the joint operation or ownership of theatres with other exhibitors. The second method had to do with activities by National, through its subsidiaries, in excluding actual and potential competition. The third method related to the agreements entered into by the Fox Circuit with competitive exhibitors not to compete in the licensing of films, but to split or divide the product.

Following a description of these methods by which National restrained trade and eliminated competition, there are findings dealing specifically with the way in which National used its circuit buying power in the licensing of plaintiff's seven pictures which were marketed during 1947

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such as A, Double A, B, C, etc., and for each theatre in the circuit there was a price and playing time designated for each bracket. The negotiation between the National buyer and distributor's representative was merely as to what bracket the picture in question fell into. When this was negotiated out and agreed upon, the terms to be paid by National were automatically determined by the bracket into which it fell. These picture classifications were in effect during the period 1947 to 1950 and had been used at least since 1940.

"36. The policies and details of operations of each of the divisions were controlled and minutely supervised by National either directly or through the medium of National Theatres Amusement, Inc. Such supervision, control and necessity for final approval by National covered such varied matters as the making of pooling agreements by Fox West Coast for the operation of the theatres in downtown San Francisco and extension of the United West Coast-Fox West Coast-United Artists Theatres agreement to approving expenditure for a new theatre 'provided the negotiations with the landlord for the commercialization of the Strand Theatres [sic] (an old theatre which was becoming obsolete) immediately upon the opening of the new theatre are brought to a successful conclusion' and such matters as authorizing the expenditure of $1224 for a new roof on a theatre.

to 1950. These pictures, the titles of which will be abbreviated elsewhere in the opinion, were: THE SECRET LIFE OF WALTER MITTY, THE BISHOP'S WIFE, THE BEST YEARS OF OUR LIVES (regular release), A SONG IS BORN, ENCHANTMENT, ROSEANNA McCOY and MY FOOLISH HEART. The final twenty-seven paragraphs of the findings deal with the question of damages.

On the basis of the findings of fact the district court entered conclusions of law setting out twelve different ways in which defendants had violated the Sherman Act. According to these conclusions of law, the objective of the described interests, relationships, arrangements and activities was the elimination of competition in the exhibition of motion pictures. This objective was accomplished by concentrating buying power in National, eliminating competitive bidding, dividing and allocating products, granting the right of first refusal and first right to negotiate for film licensing, fixing clearance schedules, and by various other means.

Judgment was entered in accordance with the findings and conclusions and in keeping with the opinion which the court had rendered. The Fox defendants appealed and plaintiff cross appealed.[15]

On their appeals, defendants argue five points: (1) the district court erred in holding that plaintiff had been damaged by any violations of the Sherman Act; (2) no liability was proved as to Twentieth Century Fox; (3) the court erroneously applied the three-year California statute of limitations because the one-year statute should have been applied; (4) the court awarded excessive attorneys' fees; and (5) the court erroneously allowed certain items of cost.

[15] A subsequent appeal was taken by defendants from the district court order taxing costs and is also before us at this time.

On the cross appeal, plaintiff argues three points: (1) the court erred in limiting plaintiff, as to defendants Twentieth Century Fox and National, to claims arising on and after May 16, 1947; (2) the court erred in excluding from the evidence the findings of fact, conclusions of law, judgments and decrees in the *Paramount* case, and (3) the finding of fact that plaintiff's actual damages for the period from May 16, 1947 to May 16, 1950, is clearly erroneous because such damages greatly exceeded that figure.

Liability—Particular Practices, Relationships and Corporate Interests

Defendants contend that none of the practices, relationships or interests examined into during the trial involved any violation of the Sherman Act, or at least any violation which could have adversely affected plaintiff. Discussing each such practice, relationship and interest, defendants assert either that the evidence does not support the finding made, or that the facts found reveal no violation of the Sherman Act, or that plaintiff was not adversely affected.

We will discuss these practices, relationships and interests individually. In the course of doing so, we will also deal with defendants' related presentation of facts and arguments concerning the individual Goldwyn pictures marketed during 1947 to 1950, and the negotiations for their licensing.

Circuit key and lump sum deals.[16] The district court found that circuit key and lump sum deals were made by the

[16] A "circuit key deal" is one under which the exhibitor agrees to pay as film rental a percentage of the film rental the picture earned nationwide, within an agreed period of time, *i.e.*, if he agreed to pay seven per cent this was calculated by treating all other domestic film rental paid as ninety-three per cent. A "lump sum deal" is one involving a single dollar amount for licensing to a theatre circuit without agreement as to the film rental to be paid by any single or group of theatres.

central buying office of National for the entire circuit with various distributions. On some circuit key deals or lump sum deals, the court found, allocations were made from National's central buying office in Los Angeles of the amounts to be paid by the various divisions of National. Defendants argue that these practices could have had no adverse effect upon plaintiff.

First, they assert, there is no finding that such a deal was made for any of the Goldwyn pictures. While this is true with regard to circuit key deals, the district court did find that RKO, which was plaintiff's distributor, requested but could not obtain percentage terms for the Goldwyn pictures, being compelled to accept flat rental terms. Moreover, as will later appear, Goldwyn pictures could be and were, adversely affected by circuit key and lump sum deals which, according to the findings, were entered into with the distributors of other pictures.

Defendants further argue that, to the extent that any such deals may violate the antitrust laws, it is because of their impact on other exhibitors, not because they are prejudicial to the distributor who agreed to them. Our attention is also called to language in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 155, where such arrangements were referred to as "formula deals," and where the Supreme Court said:

> "It is hardly necessary to add that distributors who join in such arrangements by exhibitors are active participants in effectuating a restraint of trade and a monopolistic practice."

In *Paramount*, the Supreme Court held that such deals, made for an entire circuit, constitute restraint of trade in two respects. They eliminate the possibility of bidding for

films theatre by theatre, and they represent a pooling of the purchasing power of an entire circuit in bidding for films, thereby constituting a misuse of monopoly power. This misuse, the court indicated, arises from the fact that a circuit having a complete monopoly of theatres in any one town,[17] can use a circuit key deal or lump sum deal to acquire exclusive privileges in a city where it has competitors.[18]

The direct adverse impact of such deals is upon non-circuit exhibitors, since they are placed at a disadvantage in bargaining for pictures. A producer who distributes his films pursuant to such arrangements may actually benefit therefrom, if the terms are sufficiently favorable.

But much of plaintiff's case is based upon the asserted monopoly power wielded by defendants, and the alleged ways in which it was exerted to plaintiff's disadvantage. There are numerous findings of fact sustaining plaintiff in both of these respects. The findings that National entered into circuit key deals and lump sum deals are relevant to this aspect of the case. They indicate one way in which National was able to enlarge and solidify its monopoly beyond the bounds of actual ownership.[19]

They also provide one explanation of why plaintiff had difficulty in licensing MY FOOLISH HEART and ROSE-

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[17]Such a town is known in the trade as a "closed" town. National theatres were located in approximately 189 communities in eighteen states. Approximately sixty of these communities were "closed" towns.

[18]In *Paramount*, the court referred to *United States* v. *Griffith*, 334 U. S. 100, 107-108, and *Schine Chain Theatres, Inc.* v. *United States*, 334 U. S. 110, 115-116, for a further explanation of this view.

[19]As the Supreme Court said in *United States* v. *Griffith*, 334 U. S. 100, 108:

> "When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire."

ANNA McCOY in the Fox Circuit,[20] and why plaintiff was denied the opportunity to deal with National's competitors in "open" towns if it expected to sell to National in "closed" towns.[21] Lastly, it reveals a practice whereby National could obtain more favorable film rental terms than might otherwise have been possible.

For the reasons stated, we are of the view that National's participation in circuit key deals and lump sum deals, while perhaps not giving rise to direct and independent items of damage, tends to support the charge that monopoly power was misused. Such participation, therefore, was one of the underlying causes of any damage sustained by plaintiff by reason of defendants' use of their monopoly power in the field of motion picture exhibition.

Classification of pictures. The district court found that National agreed with distributors on "brackets" or "classifications" of pictures, specifying for the pictures in each

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[20] James A. Mulvey, President of Samuel Goldwyn Productions, Inc., testified:

> ". . . in the instance of MY FOOLISH HEART and ROSEANNA McCOY, we had offered the picture to the opposition to Fox, particularly since we couldn't sell the Fox Circuit, and we had difficulties in selling those pictures to the Fox opposition because, as I believed then and now, of arrangements as between Fox and the independent, or the influence of Fox with the independent, and we were never able to sell that picture back to Fox in many of those situations. . . ."

[21] Peter Lundgren, film buyer and head of the film statistical department of Fox West Coast, discussing the negotiations for the licensing of WALTER MITTY, testified:

> "Q. In connection with that negotiation did you offer to negotiate your closed towns separately?
>
> A. No, sir.
>
> Q. From your open towns?
>
> A. No, sir.
>
> Q. They were negotiated together?
>
> A. They were part of the complete negotiation; we never separated one from the other."

bracket the terms for each theatre and thereby confining negotiations to a determination of the bracket in which a picture was to be placed. The court found that when this was agreed upon, the terms to be paid by National were automatically determined by the bracket into which the picture fell.

Defendants argue that this practice could have had no adverse effect upon plaintiff. They contend that this was only a mechanical means of simplifying deals for run-of-the-mill "program" pictures. If a distributor wanted to negotiate this way, defendants contend, this was his privilege, and if he did he was in no position to complain. In any event, defendants assert, this system was not used in licensing any of the Goldwyn pictures.[22]

We have not discovered, in the voluminous briefs, any response by plaintiff to this argument. The utilization of such a classification system could operate to narrow the area for negotiation. It obviates theatre-by-theatre consideration in negotiating for the price of individual pictures, leaving only the question of the proper price classification for agreement. But this would be true only if the system were imposed on the opposite negotiating party.

Here the testimony indicates that the classifications were arrived at by agreement between National and the distributors, and only for convenience. Thus, entirely apart from the question of whether Goldwyn Pictures were negotiated on such a basis, we cannot perceive how this particular practice could have had a direct or indirect impact upon plaintiff. We need not decide whether such a system could be so

[22]This statement is borne out by the record. Lundgren testified that National's price classification brackets were not used in connection with the negotiations for the licensing of Goldwyn pictures. The prices on the Goldwyn pictures, Lundgren stated, were higher than those listed in the classification brackets, and were negotiated "upon the reviewed upward deal on SPANISH MAIN."

employed as to constitute a violation of the Sherman Act—it was not as to this plaintiff.

Runs and clearances.[23] Twelve paragraphs of the findings of fact are devoted to runs and clearances. The district court found that producers of motion pictures when attempting to bargain with the Fox Circuit have been met with a fixed scale of runs and clearances set by Fox West Coast to which scales they have been obliged to conform.

Defendants argue that the implicit finding that the Fox Circuit set a fixed scale of runs and clearances binding upon plaintiff is clearly erroneous, since this scale was set by plaintiff's distributing agent, RKO; that there is no evidence to indicate that plaintiff was adversely affected by any scale of runs and clearances; and that runs and clearances are an economic necessity to which no illegality attaches.

Defendants call attention to evidence indicating that plaintiff accepted the system of runs, clearances and availabilities which its distributor, RKO, was using. But the evidence, both written and oral, is in conflict as to whether the system was evolved and controlled by RKO, or by National. There was considerable evidence tending to show that National used its market power to promulgate and maintain a uniform system of runs and clearances, particularly in the large metropolitan areas. On the entire record

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[23] A "run" is the period of time during which a motion picture is licensed to be exhibited at a particular theatre. A "first run" usually produces substantially greater box office receipts and film rentals than all of the "sub-runs" put together. A "clearance" is the period of time agreed upon between the exhibitor licensing a prior run and the distributor of that picture as to the amount of time which must elapse before a picture, being run in one area, may be again run by another exhibitor in that area. It constitutes a contrac right. The "availability" of a picture is the first day upon which an exhibitor may commence the exhibition of a picture under his licensing arrangement with the distributor.

we are not left with a definite and firm conviction that the district court committed a mistake in entering the challenged findings as to runs and clearances. We therefore hold that these findings are not clearly erroneous.

In *Chorak* v. *RKO Radio Pictures, Inc.*, 9 Cir., 196 F. 2d 225, 228, we held, in effect, that while runs and clearances are not illegal *per se*, they are illegal if unreasonable and if imposed as a result of concerted action. We there called attention to suggested criteria for determining the reasonableness of clearances, as referred to in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 145-146, and *Schine Chain Theatres, Inc.* v. *United States*, 334 U. S. 110, 121. These criteria call for consideration of such factors as admission prices, character and location of the affected theatres, theatre operating policies, rental terms and license fees, extent of competition, and affiliations.

In *Paramount*, the Supreme Court pointed out that the clearances which were in vogue had acquired a fixed and uniform character and were made applicable to situations "without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade." Under the district court findings in the *Goldwyn* case, this same situation was shown to exist, for the court found, on sufficient evidence, that producers of motion pictures when attempting to bargain with the Fox Circuit have been met with a "fixed scale" of clearances and runs.[24]

It is this inflexibility, plus imposition by concerted action of the defendants, which gives the district court findings on runs and clearances relevancy in this case. In *Paramount*, the thrust of such action was by distributors against exhibi-

[24]While plaintiff is not specifically named in this group of findings, it is a producer and so is included among those who were confronted with this fixed scale.

tors. Here, the thrust of such practice was by a combine of exhibitors, acting in concert with a producer, against independent exhibitors. The result was to weaken the competitive theatre-exhibiting market which plaintiff needed in order to bargain effectively with the Fox Circuit.

While there is no explicit finding to this effect, we believe it is implicit when all of the findings are considered together. The findings as to runs and clearances are therefore relevant to the over-all inquiry which was before the court, and tend to show that plaintiff was damaged by antitrust activity on the part of defendants.

Circuit buying power. The district court found that: film buying for the entire Fox Circuit was centralized in Los Angeles; Edwin F. Zabel, at various times, negotiated for film for all the divisions of National, and made deals for the entire circuit; the Goldwyn and Metro pictures were bought by Zabel for the circuit; RKO was obliged to accept National's circuit-wide terms; and Fox did business as a theatre circuit in totality, ". . . requiring a producer of films to do business with Fox or lose a fortune."

The existence and exercise of this circuit buying power, the district court found, was reflected in the terms which were imposed upon plaintiff and its distributor, RKO. RKO, the court found, could not obtain the terms and conditions from National it requested and received from other exhibitors for the Goldwyn pictures. Among the terms thus denied to RKO on the Goldwyn pictures, were percentage terms, as distinguished from flat rental.

As a result of this and other practices, the court found, plaintiff was caused to earn less total rentals than would have been earned in a free competitive market. In the same vein the court found that these and other acts of the defendants had an injurious impact upon plaintiff's motion pic-

tures ". . . in that they depreciated the film rentals that would otherwise have been realized."

Defendants contend that most of the findings dealing with circuit buying power are clearly erroneous. They also argue that except to the extent that they deal specifically with transactions between defendants and plaintiff or its distributor, RKO, these findings are irrelevant. Defendants also ask us to differentiate between a mere failure of buyer and seller to agree on terms, and the exertion of an exhibitor's "buying power" to force distributors to deal. In addition, defendants contend that no venal inference arises from the mere size of National, taking the position that size alone without reference to a defined, relevant market is entirely meaningless.[25]

While the testimony is in dispute concerning the practice of circuit buying, there is ample evidence to support the district court's findings that Edwin F. Zabel, representing National, bought pictures, including plaintiff's, for the entire Fox Circuit. Not all National theatres, however, were included in each transaction, as special circumstances resulted in the exclusion of some National theatres in most cases. For example, in San Francisco, Los Angeles, Denver and Kansas City where both National and RKO had one or more first-run theatres, RKO, as distributor for plaintiff, would usually give the first run of plaintiff's pictures to its own first-run house.[26]

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[25]Defendants also argue that the finding that film buying was centralized in Los Angeles is a "frivolity" which should be brushed aside, citing *G & P Amusement Co.* v. *Regent Theater Co.*, N. D. Ohio, 107 F. Supp. 453, *aff'd per curiam*, 6 Cir., 216 F. 2d 749. In our view this finding was designed only to round out the district court's description of defendant's circuit buying practices and was not intended to have independent significance.

[26]National had first-run theatres in nineteen cities having a population of over one hundred thousand. In six of those nineteen cities, plaintiff's pictures were not offered to National because RKO also had a first-run house, or for other reasons.

But, despite such exceptions, the fact remains that, on the whole, plaintiff sold pictures to National for exhibition in its large circuit, or it did not sell to any National theatres. And when Zabel bought for the "circuit" that included not only theatres owned and operated by National, but also numerous theatres which National controlled or influenced.

Contrary to defendant's contention, there was evidence from which it could be inferred that National used its position in closed towns to exert pressure on distributors. At least two witnesses testified, in effect, that it was not possible to negotiate for National's closed towns alone.[27] Where such circumstances exist it may reasonably be inferred that the monopoly power arising from control of closed towns is being used to exact favorable terms in open towns.[28]

There was also evidentiary support for the findings concerning percentage terms and flat rentals. According to this evidence, plaintiff was unable to get terms based on a per-

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[27] See Lundgren's testimony, quoted in note 21. Robert Mochrie, employed in plaintiff's distribution department, testified that Zabel never offered to license theatres in closed towns on a separate and distinct basis from those theatres in which the Fox Circuit had competition.

[28] As the Supreme Court said in *United States* v. *Griffith*, 334 U. S. 100, 107-108:

> "A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. . . . Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns where he has competitors, the effect is likely to be the same where the two are joined. When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in a legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did. . . ."

centage of gross admissions except as to what National designated as "percentage theatres." As to the remaining National theatres, only flat rentals, fixed regardless of performance, were available to plaintiff. But National's version of percentage terms, involving a so-called "sliding scale" was itself unfair to producers, according to evidence which the district court was entitled to believe.[29]

With regard to almost every other facet of National's buying practice now under discussion the oral testimony is in dispute and the written evidence is inconclusive. In these circumstances we are unable to hold that the findings entered, as reviewed above, are clearly erroneous.

Defendants extensively review the evidence pertaining to the licensing of each of plaintiff's pictures marketed in 1947 to 1950 period, and conclude therefrom that whether or not there were illegalities which might be complained of in a government case or by other exhibitors, none were practiced upon plaintiff in connection with these seven pictures. They also argue that, in any event, the district court should have made findings with respect to the treatment plaintiff received in the negotiations pertaining to each of these pictures.

The evidence was by no means undisputed concerning the negotiations for the licensing of these pictures. But apart from this, the conversational or written give-and-

[29]The "sliding scale" involved a calculation of theatre expenses and their allocation to each National theatre according to an arbitrary formula. These expenses were supposed to be actual, but there was testimony that they were not. Included among them were sums paid pursuant to joint ownership or operating agreements, circuit administrative expenses, federal excise taxes, and National expenses of defending antitrust suits. Both RKO and National's parent corporation, Twentieth Century Fox, protested "expenses" charged against revenue in computing rentals by the sliding-scale method. Goldwyn asked for an audit of theatre expenses with respect to BEST YEARS OF OUR LIVES, but was refused.

take which comprised the surface negotiations is not necessarily a reliable indication of the real forces at work, or so the district court could find. If National held an overpowering bargaining position by reason of its intercorporate relationships and alliances, to be discussed below, acquiescence by plaintiff or its distributor, RKO, in licensing terms does not manifest fair bargaining in a climate of free competition. If, as the evidence tends to show, National exerted a similar power in connection with its dealings with other producers except Twentieth Century Fox, and with other distributors, the fact that plaintiff fared as well, rental-wise, proves little.

Defendants, on the basis of their review of the individual transactions, call attention to the fact that no representative of RKO has ever said that plaintiff was coerced or imposed upon or subjected to any improper pressure in any dealings with National. They point out that RKO, with a twenty per cent interest in the rental of plaintiff's films has never asserted any claim that the rentals paid by National were unfair, discriminatory or inadequate. They note that plaintiff itself, before this litigation, had never asserted that the film rentals paid by National for WALTER MITTY and BISHOP'S WIFE were inadequate, discriminatory or in any way unsatisfactory.

There are, of course, factors to be taken into consideration in making the basic findings on this branch of the case, and in testing, on review, the evidentiary support for such findings. But, although persuasive, they are not conclusive. The business relationship between RKO and National during the critical period, and since, may well have been such as to preclude, from a practical standpoint, any indication of dissatisfaction by RKO. Likewise, the very circumstances which, as the district court found, forced plaintiff to deal

with National largely on the latter's terms, may have restrained plaintiff from making an issue of the film rentals for WALTER MITTY and BISHOP'S WIFE prior to this litigation.

Perhaps the reason why findings were not made as to the negotiations of each picture is because the district court perceived that it was more important to examine the underlying considerations which governed the negotiations than to report what offers and counter offers passed between the parties. The findings which were entered, dealing generally and specifically with the relevant practices and relationships which necessarily set the course for the negotiations, were thorough and complete. If, as we hold, these general findings are not clearly erroneous, the lack of detailed findings concerning the negotiations for each picture does not undermine the integrity of the judgment.

We conclude that the findings of fact as to defendants' circuit buying power, and how it was exercised, are sufficient, and are supported by the evidence. Taken in conjunction with all of the other findings of fact, they tend to support the conclusions reached concerning defendants' antitrust activities with regard to plaintiff during the period in question.

Allocated or split product. The district court made findings to the effect that National and competing exhibitors entered into arrangements as to the licensing of pictures whereby they "allocated product" or "split product" by agreeing as to what picture each would license.[30]

Defendants concede that "there were certain arrangements relating to the negotiations for pictures." But these, defendants assert, were not designed nor did they operate

[30]Among these findings were Nos. 54, 77, 101, 155, 166 and 167.

as anti-competitive restraints, being actually designed for the benefit of exhibitors and distributors. The objective, we are told, was to give exhibitors some assurance of a regular supply of product and to give distributors some assurance that outlets would be available to them. No such arrangements were made, defendants contend, unless the distributor or distributors who were involved were parties to it. In any event, defendants urge, no such arrangements had any effect on the licensing of the Goldwyn pictures and no theory of damages was related to these claimed arrangements.

There was no evidence to the effect that all distributors, including RKO which represented plaintiff, had their regular customers and, to serve their own interests, gave such customers preference in the initial negotiations for their pictures. But the agreements referred to in the findings of fact, were, for the most part, arrangements between exhibitors, under which a given exhibitor was given the first opportunity to negotiate for a picture or pictures. There were, however, no agreements that if the first negotiation failed the other exhibitor or exhibitors were foreclosed from negotiating for the picture. Nor were there any agreements as to prices to be offered or paid, although sometimes the allocation arrangement resulted in the withholding of a bid or the tendering of a fictitious bid by an exhibitor who, under the arrangement with another exhibitor, was not to get that particular picture.

It is also true that distributors usually learned, from one source or another, of the various arrangements entered into between exhibitors for the allocation of product. With knowledge of such arrangements they nevertheless often entered into licensing agreements with exhibitors who were parties to such arrangements. But there was also evidence to indicate that distributors usually were not informed of

these arrangements by the exhibitors who were parties thereto, and that the distributors were not themselves parties to the allocation arrangements as such.

For the purposes of this case, we may assume that the following excerpt from the unreported opinion of Judge Palmieri in *United States* v. *Loew's*, 1962 CCH Trade Cases, par. 70,347, called to our attention and relied upon by defendants is a correct statement of the law:

> "Concededly, any arrangement whereby exhibitors agree with each other that they will not compete in the buying of the product cannot be countenanced; although it is equally clear that splits of product with the consent of both distributors and exhibitors are proper."

As indicated above, the evidence in this record indicates that there were many splits of product to which the distributor, and particularly RKO on behalf of plaintiff, had not consented in advance, but which were the result of arrangements between competing exhibitors. The action of a distributor in licensing films to an exhibitor with knowledge, usually from other sources, of the arrangement between exhibitors under which the particular film was allocated to that particular exhibitor, may or may not indicate consent to such an arrangement, depending upon the circumstances of the case.

Where, as here, the exhibitor has a dominating bargaining power by reason of its corporate structure and business alliances, such acquiescence, in this case by RKO for plaintiff, is likely to manifest surrender in the face of economic pressure. We are unable to say, on this record, that the district court erred in viewing, in this light, the allocation arrangements affecting plaintiff between the Fox

Circuit and competing or allied exhibitors which were in effect during the period in question.

At least six of the sixteen specific instances of product arrangements and alliances referred to in the findings of fact involved only years subsequent to the 1947 to 1950 period here in question. As to some of the other specific instances the evidence does not clearly establish that the critical period was involved. As to most of the specific instances, only one or two of the seven pictures in question could have been affected.[31]

While these circumstances tend to minimize the adverse impact which this practice could have had upon plaintiff, insofar as recovery of damages in this case is concerned, they do not completely negative such an impact. As in the case of other practices which have been or will be discussed, it was not possible to determine, in dollars, the damages attributable to the practice of allocating and splitting product, and the district court did not attempt to do so. Nevertheless, if the findings that this practice occurred are sustainable, and we hold that they are, and if the conclusion that the practice was illegal under the circumstances is correct, and we hold that it is, such findings and conclusion have relevance as tending to support the holding on liability and the fact, if not the amount, of damages.

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[31] Defendants urge that the only Goldwyn pictures which could possibly have been affected by the practice under discussion are the last two which were brought to market during the 1947 to 1950 period. They point out that these pictures were not offered to National but were "sold away," reasoning therefrom that the practice could have had no adverse effect upon plaintiff. But the application of the "split" system to these two pictures tended to depress the price National was willing to offer. See *Royster Drive-In Theatres, Inc.* v. *American Broadcasting—Paramount Theatres, Inc.*, 2 Cir., 268 F. 2d 246, 250. Thus it was at least a contributing factor in requiring RKO, distributing for plaintiff, to look elsewhere for purchasers, to plaintiff's disadvantage as the court found.

Competitive bidding. Under a system of competitive bidding, as applied to the motion picture industry, a distributor who has a picture available sends to competing exhibitors an invitation to bid on the picture. If they respond the distributor, in theory, is to accept the best bid. In practice the distributor sometimes rejected all.

The practice of competitive bidding is closely related to that of allocating and splitting product. Where the latter practice is followed, there is either no competitive bidding or it is subject to being circumvented by fake bidding or abstention of bidders.

The district court found that: the competition engendered by honest competitive bidding resulted in the payment of higher film rentals, and increased playing time, as compared to transactions not involving competitive bidding; competitive bidding for pictures developed at the conclusion of the *Paramount* case and served as a means of assuring some measure of competition in the industry; during the three years involved in the present case, competitive bidding occurred not only as to plaintiff's pictures in certain instances, but also as to many of the products of defendants and their rivals; National, in concert with other exhibitors, however, restrained and eliminated competition with respect to plaintiff's pictures by agreements to eliminate competitive bidding.

Defendants call attention to difficulties and defects in any system of competitive bidding for motion pictures. They cite decisions in which the system has been criticized, including the *Paramount* case, where a provision of the decree enforcing bidding was disapproved.[32] They call

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[32]In Paramount, after pointing out, at 334 U. S. 162-163, some of the practical problems involved in applying competitive bidding to the licensing of films, the court said, at 164:

> "The system uproots business arrangements and established relationships with no apparent overall benefit to the

attention to evidence in the record indicating that distributors, including RKO, do not like competitive bidding, and that plaintiff never initiated competitive bidding but was content to follow RKO's policy which was not favorable to competitive bidding.

Plaintiff, however, does not contend that competitive bidding is an ideal method of film licensing. It does not appear to rely, in this court, upon the trial court's finding that National agreed with other exhibitors to eliminate competitive bidding, and that this restrained and eliminated competition.[33] Plaintiff finds significance in the competitive bidding evidence in this case only as it assertedly provides a way of measuring plaintiff's damages resulting from other practices followed by defendants.

There is, indeed, evidence to indicate that in those instances where National practiced competitive bidding, it paid more for films than when it negotiated for them. In this respect, the evidence as to competitive bidding has probative value here.

Relationship to Naify operations. As explained in note 4, the Naify Circuit was comprised of three corporations, *i.e.*, United California, T. & D. Jr., and Golden State.

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small independent exhibitor. If each feature must go to the highest responsible bidder, those with the greatest purchasing power would seem to be in a favored position. Those with the longest purse—the exhibitor-defendants and the large circuits—would seem to stand in a preferred position. If the fact they were enabled through the competitive bidding system to take the cream of the business, eliminate the smaller independents, and thus increase their own strategic hold on the industry, they would have the cloak of the court's decree around them for protection. Hence the natural advantage which the larger and financially stronger exhibitors would seem to have in the bidding gives us pause."

[33]Defendants, on the other hand, do not appear to challenge this finding of fact.

National was a stockholder in both Golden State and T. & D. Jr.[84] The Naify Circuit owned or operated over one hundred theatres in California and Nevada.

The district court found that the Naify Circuit used its circuit-buying powers to establish a preferential system of runs, clearances and availabilities on behalf of its forty theatres in San Francisco and the East Bay area, based on admission prices. The district court also found that the Naify Circuit did not license pictures on a theatre-by-theatre basis, but on a circuit basis; on such circuit deals, the Naify Circuit combined closed towns with open towns; and that the Naify Circuit gave Twentieth Century Fox preferential treatment in the booking of pictures. It was found that agreements existed between the Naify Circuit and the Fox Circuit, relating to the maintenance of non-competitive theatre holdings and to the negotiation and licensing of motion pictures.

The court also made the following findings of fact concerning the Naify Circuit:

> "92. From the time the pooling agreements were entered into between the Naify Circuit and the Fox Circuit, the Fox Circuit actively assisted and aided the Naify Circuit in the negotiation and licensing of motion pictures.
>
> "93. In 1947 and 1948 conferences were held between the Naify Circuit and the Fox Circuit with respect to the development of a sliding scale based on theatre expenses for use by the Naify Circuit.

[84] National owned 24.6% of the stock of Golden State and had an ultimate interest of 26.62% in the corporation during the years here in question. National owned 26.69% of the stock of T. & D. Jr. and held an ultimate interest of 31.77%.

"94. Joseph Schenck became an intermediary in film licensing negotiations between the Naify Circuit and Loew's, Inc."

With regard to these quoted findings, defendants first argue that, as the owner of almost a third interest in the Naify Theatres, National had a natural interest in its investment. They point out, however, that National and Naify had no common directors, officers or agents,[35] and assert that National took no part in the Naify operation or its management. Moreover, defendants insist, National had no part in fixing the terms on which Naify licensed pictures, thus in effect challenging certain of the findings referred to above.

There is substantial evidence to support finding of fact No. 93, quoted above. Copies of correspondence were introduced showing that, in 1948 and 1949 there were conferences and exchanges of data pertinent to a sliding scale of expense formula.[36] With regard to findings Nos. 92 and 94, however, plaintiff calls attention to no supporting evidence. Defendants have called attention to what they represent to be the only evidence bearing thereon. All of it, except one item, relates to years other than 1947 to 1950, and the one item which relates to the critical years actually has to do with finding No. 93.

The corporate interrelationship between National and the Naify Circuit may of course have antitrust significance apart from particular operating practices of the kind under

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[35]National did have two representatives on the Naify boards of directors.

[36]We refer to plaintiff's exhibits Nos. 110 and 115, and associated testimony. Numerous other exhibits bearing upon such contacts between National and the Naify Circuit dealt with years not involved in this suit.

discussion. This is a matter to be discussed below. Confining ourselves at this point to the three findings of fact which defendants challenge, we hold that No. 93 is supported by the evidence and has relevance to the question of antitrust violations, and that Nos. 92 and 94 are clearly erroneous, insofar as the years 1947 to 1950 are concerned.

National's corporate structure and theatre interests. The district court found that in addition to the theatres it owned, National controlled over 150 theatres through various forms of joint operating agreements, joint corporations, pools, and joint ventures. The two largest groups of theatres in which National or a subsidiary was found to hold such a joint interest were the fifty-eight houses operated by United West Coast Theatres Corporation (United West Coast) and the Principal Theatres, Inc. theatres, comprising fourteen houses.

The court found that the means utilized in acquiring such control involved the making of commercial alliances with independent exhibitors in National territory ". . . who, but for the alliances would have been formidable competitors in the market for plaintiff's pictures." The court found that the buying of films for all theatres in the various pools in which National had an interest was done entirely by National. An exception to this practice was made in the case of the Naify Circuit, the court found, as the buying of films for the Naify Circuit was done by that circuit, but with the advice and active collaboration of National.[37]

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[37]The foregoing findings are contained in finding of fact No. 37. In findings Nos. 38 to 41, the court listed the theatres in which National or a subsidiary, and one or another of many named competitive exhibitors, held joint ownership or operating rights during 1947 to 1950. As to most of these theatres the percentage interest of National or its subsidiary was indicated, the percentage ranging from 25.5% to 90.83%.

The district court found that a basic agreement, first entered into by United Artists and Fox West Coast on September 1, 1933, but further extended to at least December 31, 1959, provided that ten United Artists theatres and approximately twenty-three Fox West Coast Theatres were leased or subleased to United West Coast. United West Coast was owned seventy per cent by Fox West Coast and thirty per cent by United Artists.

The court found that, under this agreement, certain other theatres were to be operated by Fox West Coast, the profits and losses to be divided between the parties on the seventy per cent-thirty per cent ratio. The court found that, as a result of the pooling of interests of Fox West Coast and United Artists in United West Coast, ". . . competition both generally and specifically with respect to the licensing of plaintiff's pictures for exhibition, was restrained and eliminated."[38]

The court found that, after the formulation of the United West Coast pool under the basic agreement, twenty-three theatres were acquired by Fox West Coast or United Artists, or together, but were not operated by Fox West Coast and United Artists in competition with one another. Instead, the court found, these theatres were added to the United West Coast pooled holdings pursuant to the "no separate acquisition" provision of the basic agreement.

According to the district court, the United West Coast pool was not terminated until February 1, 1950. During

[38]The court also found that competition was further restrained and eliminated by the provision of the basic agreement between United Artists and Fox West Coast that neither party would construct or operate theatres in various sections of California except under stipulated conditions. These conditions were that such newly-constructed theatres would be placed into the pool, and that the profits from the operation of such theatres would be divided between the parties.

the time of its existence, the court found, this pool was a restraint upon and worked an elimination of competition between Fox West Coast and United Artists and other exhibitors. The court found that during the period 1947 through 1949, a total of $31,125,433.15 in admissions revenue, or 21.67 per cent of the total Fox West Coast admissions revenue was derived from the operation of the United West Coast Theatres pool. The court expressly found that this pool operated to restrain and eliminate competition among these parties for the licensing of plaintiff's pictures.

Findings of the same general character, although not as detailed, were made with regard to the relationship between Fox West Coast, United Artists Theatres, and the Naify Circuit, and Fox West Coast and Principal Theatres, Inc.[39]

The district court concluded that defendants' joint operating arrangements with the United Artists Theatre Circuit, their interests in the Naify Circuit, their representation on its board of directors, the elimination of competition between the Naify Circuit and Fox West Coast, and defendants' joint operating arrangements with competitive exhibitors in the Principal Theatres and Hamrick pools, violated section 1 of the Sherman Act. The court further concluded that the combination of the United Artists pool, the Principal pool, the Hamrick pool, the Naify Circuit, and all the other joint operating arrangements and joint interests with competitive exhibitors, taken as a whole, violated sections 1 and 2 of the Sherman Act.

[39]Since January 1, 1937, Fox West Coast has owned fifty-one per cent of the outstanding shares of Principal Theatres, Inc., which operated twenty-five theatres, seven of which were located in downtown Los Angeles. During the period 1947 through 1949, the court found, a total of $13,766,768.12 in admissions revenue, or 9.58% of the total Fox West Coast admission revenue was derived by Fox West Coast from the operation of the Principal Theatres pool.

With regard to these findings, defendants first object to the use of the term "pools" in referring to jointly-owned corporations. They point out that, as indicated in the *Paramount* case, 334 U. S. 131, 149, pooling agreements are those between exhibitors by which their theatres, normally competitive, are operated as a unit, or managed by a joint committee or by one of the exhibitors, the profits from all theatres in the pool being shared according to prearranged percentages. In *Paramount*, the court distinguished between "pooling agreements," as so defined, and arrangements between exhibitors for joint ownership of theatres.

Defendants concede that, prior to June 30, 1947, National had been a party to certain pooling arrangements. They assert, however, that all such pools had been terminated as of that date and therefore could have had no effect upon the Goldwyn pictures here involved.

Defendants are correct in drawing the indicated distinction between pooling agreements and other business arrangements involving joint ownership of theatres. However, defendants have not been prejudiced by any characterization of joint ownership agreements as "pooling" arrangements.

Although all "pools" in the *Paramount* sense may have been terminated prior to June 20, 1947, the record discloses that joint ownership arrangements of the kind dealt with in the *Paramount* case, continued during the damage period. The basic agreement which Fox West Coast and United Artists entered into on September 1, 1933, in which joint ownership arrangements were provided for, was last extended by written agreement dated August 4, 1944. The basic agreement was thereby extended to December 31, 1959. It was actually terminated on December 21, 1949, in fulfillment of a provision of the *Paramount* decree.

National also held partial or controlling interests in other exhibiting corporations outside of the Twentieth Century Fox hierarchy. The two prime examples of this are Principal Theatres, Inc., in which National held a controlling interest, and the Naify Circuit, in which National held a substantial although minority interest.[40] As before indicated, the district court found and concluded that these joint-ownership arrangements violated the Sherman Act.

Defendants argue that National's joint ownerships in such corporations during the years in question were not *per se* illegal. We need not decide whether this is true, because the district court did not hold that such joint ownerships were illegal *per se* and the plaintiff does not here argue that they were.

What the district court held, and what plaintiff here asserts, is that these joint ownerships were illegal under the particular facts of this case. Defendants challenge this holding and make reference to facts of record which, in their view, establish the innocuous character of these joint ownerships, at least insofar as plaintiff is concerned.

Our examination of the evidence leads us to conclude that the district court was warranted in concluding that the several joint ownership arrangements involved violations of the Sherman Act. The basis for reaching this conclusion was probably more broadly established with respect to the Principal Theatres and Naify Circuit joint ownerships than with regard to the National-United Artists joint ownership

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[40] In finding of fact No. 38, twenty-six corporations, operating seventy-eight theatres, are listed which, during the 1947 to 1950 period, were putative competitors of National, and in which National held an ownership interest of from 25.5% to 90.83%. This is in addition to National's seventy per cent joint interest in United West Coast, which operated fifty-eight theatres under the joint ownership arrangement between National and United Artists. Nor do the figures stated above include the Naify Circuit, in which National also had an interest.

in United West Coast. The latter, however, at the very least gave effect to a meticulous allocation of areas within which the parties agreed not to compete. Such an arrangement is actually illegal *per se*.[41]

The adverse effect which such joint ownerships have upon competition among exhibitors was discussed at length in the *Paramount* case, 334 U. S. 131, at 149-153. While the problem was there viewed primarily from the standpoint of the independent exhibitors, the opportunities for restraining competition which such joint ownerships afford were equally adverse to the interests of independent producers. Plaintiff's only hope of maintaining a strong bargaining position with National was to have available a competing market of independent exhibitors. Every alliance which National made with other exhibitors weakened that competing market.

We hold that, in the main and to the extent required to support the judgment which was entered, the district court's findings concerning National's corporate structure and theatre interests during the 1947 to 1950 period are not clearly erroneous. The conclusions which the court drew therefrom, to the effect that such structures and interests were violative of sections 1 and 2 of the Sherman Act, accord with our view of the law. The adverse effect thereof upon plaintiff during the critical years was sufficiently established to support the finding that plaintiff had been substantially damaged.

* * *

In the above review of particular practices, relationships and corporate interests, we have indicated that, in some respects the findings and conclusions of the district court

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[41] See *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 597-598; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 241.

are not sustainable. In the main, however, we had indicated that the findings and conclusions of the district court are supported by the evidence and the law. We therefore hold that the district court did not err in finding and concluding that defendants engaged in proscribed antitrust activities during 1947 to 1950, which resulted in damage to plaintiffs.

Liability—Twentieth Century Fox

Twentieth Century Fox contends that, whatever liability may have been established as to the other defendants, none was established as to Twentieth Century Fox.

In support of this view that company argues that all of the findings upon which liability was predicated related to claimed activities or restraints on the part of National only, in the operation of theatres. Twentieth Century Fox further asserts, in effect, that there is no evidence whatsoever which would support a finding of fact that that company, as a producer or distributor of motion pictures, or otherwise, had engaged in any activities which affected the plaintiff in any respect.

The practices, relationships and interests which were held to constitute such violations are referred to in paragraphs 2 through 13 of the conclusions of law. The principal violations referred to in these conclusions of law relate to the acquisition of monopoly interest, maintenance of joint interests, the formulation of joint operating arrangements, and participation in various forms of agreements and arrangements between defendants and their competitors.

The objective of these various interests, relationships and arrangements was the elimination of competition in the exhibition of motion pictures. This objective was ac-

complished by concentrating buying power in National, dividing and allocating products, granting the right of first refusal or first right to negotiate for film licensing, fixing clearance schedules, and by various other means.

That the district court intended to charge Twentieth Century Fox with many of these violations is demonstrated by the fact that in six of the twelve relevant paragraphs of the conclusions of law, the defendants are referred to collectively, no individual defendant being named (Paragraphs 2, 4-6, 11-12). Three other paragraphs refer to the defendants collectively and also to one or another of the named defendants (Paragraphs 3, 9, 13). It remains to be determined whether the findings of fact support these conclusions of law, insofar as Twentieth Century Fox is concerned.

The findings of fact reveal that the specific acquisitions, all of the joint interests and joint operating arrangements, and most of the various forms of collaboration between defendants and competitors, referred to in the conclusions of law, were engaged in by defendants National or one or more of its subsidiary corporations, Twentieth Century Fox not being expressly named as a participating defendant. This is likewise true, with exceptions to be noted, with regard to the specific means employed in achieving the desired objective of restraining competition in the exhibition of motion pictures.

But the findings of fact refer to at least two ways in which Twentieth Century Fox participated in some of the specific activities which, the district court held, constituted Sherman Act violations.

It was the recipient, and therefore a participant in the practice, of preferential treatment from the Naify Circuit in the booking of pictures. The Naify Circuit gave Twentieth Century Fox the best playing time, including holdings

and extended runs (Paragraphs 86, 87). This necessarily prejudiced all other producers whose films were being exhibited by the Naify Circuit.

In 1945, and again in 1947, Twentieth Century Fox, through its distribution department, received rebates from National in the amount of $500,000 representing additional film rental on pictures produced by Twentieth Century Fox and exhibited in National theatres. The significance of this incident lies in the fact that although uniform film-rental schedules were purportedly prescribed by National, that company, was in effect, passing along to Twentieth Century Fox some of the profits it realized by imposing low rental rates on competing producers, including plaintiff.

These findings are sufficient, we believe, to support the district court's conclusion that Twentieth Century Fox is liable to plaintiff for damage proved. They establish that Twentieth Century Fox was a participant in, and a beneficiary of, the combinations, contracts and conspiracies found to exist. It must therefore share responsibility for the resulting damage, including that occasioned by activities in which it did not directly participate, or from which it did not directly benefit.[42]

Damages

The district court found that, by reason of defendants' conduct in violation of sections 1 and 2 of the Sherman Act, plaintiff sustained actual damages in the amount of $100,000 during the period from May 16, 1947 to May 16, 1950.

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[42]Twentieth Century Fox indirectly partcipated in, and benefited from, the activities of National and its subsidiaries, through its one hundred per cent ownership of National. In view of our holding stated immediately above, however, we need not decide whether this would be an independent reason for deciding that the findings of fact support the conclusion that Twentieth Century Fox is liable to plaintiff.

Under their argument as to the amount of damages defendants assert that a study of the revenues received by plaintiff during this period will demonstrate that no damage was sustained, and that the finding of $100,000 actual damages is therefore clearly erroneous. Specifically, defendants urge that an examination of the evidence pertaining to the results from the exhibition of the seven pictures in question shows that National's treatment of plaintiff's pictures compares favorably with its treatment of comparable pictures of other producers. They also insist, on the basis of this evidence, that National's treatment of plaintiff's pictures compares favorably with the treatment accorded them by other exhibitors.[43]

On its cross appeal, plaintiff contends that the district court erred in finding that plaintiff's actual damages were only $100,000, asserting that they were not less than $300,000.

Plaintiff first argues that defendants' studies covering National's treatment of plaintiff's pictures as compared to its treatment of comparable pictures of other producers is

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[43]Defendants presented this evidence in the form of four studies. The first three of these were studies of box-office revenue per unit and film rental per unit, picture by picture and theatre by theatre on first-runs in National and non-National theatres in, respectively, selected cities of the United States, selected cities of western United States, and in eight groups according to population sizes. The fourth study, really comprising three individual studies, was of performance and treatment of Goldwyn pictures, one by one, in National and RKO first-run theatres in selected cities of the United States, and in cities of varying population size.

On the basis of the first three of these studies, and charts developed therefrom, defendants contend that the film rentals paid by National for the Goldwyn pictures compared favorably to those paid by first-run exhibitors in the larger cities, in relation to box-office receipts. On the basis of the fourth study, defendants conclude that National paid as well or better for the Goldwyn pictures than did RKO, plaintiff's distributing agent.

irrelevant, the only question being whether plaintiff received the price it would have obtained in an open and competitive market. Second, plaintiff contends that the conclusion defendants draw that plaintiff received non-discriminatory treatment from National is undermined by the facts concerning National's rebate to Twentieth Century Fox.

Concerning defendants' argument that National's treatment of plaintiff's pictures compares favorably with the treatment accorded them by other exhibitors, plaintiff's challenge is principally on the ground that defendants did not select appropriate non-National exhibitors for comparison and that they utilized improper statistical methods. Taking defendants' data as to film rentals, gross admissions, and the like, and employing what it regards a proper statistical method, plaintiff compares results obtained with its pictures at National, as compared to non-National exhibitors in markets which, according to plaintiff, more nearly resembled competitive markets. Plaintiff presented these materials in the form of six statistical studies. Needless to say, the results were strikingly different from those produced by defendants' studies.[44] Defendants are as critical of plaintiff's studies as plaintiff is of defendants'.

On its cross appeal as to damages, plaintiff does not rely on the opinion testimony of its own witnesses. But in answering defendants' contention, on the appeal, that no dam-

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[44]As a result of its first study, plaintiff computed its damages as a result of assertedly low rentals paid by National on the five Goldwyn pictures exhibited by National in 1947 to 1950, at $469,000. As a result of the other studies, the aggregate estimated damages were, according to plaintiff: 476,000 (second study); $374,069 (third study), $287,675 (fourth study), and $201,898 (fifth study). In addition to the foregoing, plaintiff computes damages of $169,200 (sixth study), this study being limited to the two Goldwyn pictures, ROSEANNA McCOY and MY FOOLISH HEART, which damage, according to plaintiff, is attributable to defendants' "almost total refusal to license."

age was sustained, plaintiff calls attention to opinion testimony which was received in its behalf. James A. Mulvey, President of Samuel Goldwyn Productions, Inc., and Robert Mochrie, Vice President and General Sales Manager of RKO, both testified as to the impact of defendants' theatre holdings and practices upon plaintiff.

Each of them expressed the view that because National bargained on an all-or-none basis, and because it would be financially disastrous should they fail to sell a Goldwyn picture to National, they were obliged to accept film rentals greatly below the levels which would have prevailed in a competitive market. Defendants attack this testimony, and particularly that of Mulvey, most aggressively.[45]

In determining the amount of damages the court apparently found strength and weakness in the evidence submitted by both parties. It arrived at a figure for actual damages which was $100,000 more than the zero damages defendants argued for, and $200,000 less that the minimum damages plaintiff believed the evidence would support.

The court found that, based upon comparisons derived from defendants' figures, plaintiff received $62,000 less from National for WALTER MITTY than would have been received under similar conditions absent the "illegal monopoly" of National. Plaintiff, the court found, similarly received $29,000 less for ENCHANTMENT than it actually received from non-National exhibitors under similar circumstances, absent monopoly factors. The court found that

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[45]Defendants point out that Mulvey did not take part in any of the negotiations for licensing the Goldwyn pictures to National, and had no first-hand knowledge of what went on. They argue that he was not qualified to express an expert opinion as to actual competitive conditions. They further assert that the questions asked of Mulvey on direct examination did not specify, nor were defendants able to develop on cross-examination, the factual data upon which Mulvey purported to rely.

the foregoing figures are not the complete measure of damages for they do not take into account the increase in playing time, absent monopoly factors. The court found that Mulvey's testimony, to the effect that plaintiff was damaged in the amount of $287,675 as to the five pictures exhibited by National, "is persuasive as a base upon which to predicate a reasonable estimate of damages."

None of the studies submitted by either party was so indisputably correct as to warrant a holding on appeal that it is conclusive and controlling as to the amount of damages. Each such study had qualities which gave it probative weight. Each was subject to discount in the light of direct attack or counterbalancing studies. The district court properly appraised these studies in the light of associated testimony and independent opinion evidence. The amount of damages awarded lies within the range of all of the evidence as to damages.

Both as to the appeal and the cross appeal, therefore, we hold that the district court did not err in setting actual damages at $100,000.

Statute of Limitations

Which statute of limitations. All that is said above on the question of damages sustained during the years 1947 to 1950, is said on the assumption that the applicable statute of limitations does not preclude recovery for those years.

This assumption is well founded if the applicable statute of limitations is Cal. Code Civ. Proc., § 338(1) prescribing a three-year period for the commencement of actions upon a liability created by statute, other than a penalty or forfeiture. This action was commenced on May 16, 1950. The

three-year period would accordingly extend from May 16, 1947 to May 16, 1950.

Defendants argue, however, that the applicable statute of limitations is Cal. Code Civ. Proc., § 340(1) prescribing a one-year period for the commencement of actions upon a statute for a penalty or a forfeiture, when the action is given to an individual. This statute is applicable, defendants contend, because an action for treble damages under the antitrust laws is an action for a penalty. The limitation of plaintiff's claim to one year would mean, at most, only two of the Goldwyn pictures would be involved.[46]

Defendants pleaded both the one- and three-year statutes of limitations as defenses to the action. Thereafter, they moved for a partial summary judgment dismissing all claims, if any, of the plaintiff which accrued prior to May 16, 1947. The district court understood from this motion that defendants were then relying only upon the three-year statute of limitations instead of the one-year statute.[47] This assumption was warranted, since otherwise defendants would have asked for dismissal of any claim which accrued prior to May 16, 1949.

When the district court granted partial summary judgment at defendants' request, thereby limiting plaintiff's claims to the 1947 to 1950 period, it was plaintiff, and not

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[46]These two pictures, ROSEANNA MCCOY, and MY FOOLISH HEART, were not licensed to National.

[47]In its order of October 3, 1950, granting defendants' motion for partial summary judgment, reported in *Samuel Goldwyn Productions, Inc. v. Fox West Coast Theatres Corp.*, N.D. Cal., 146 F.Supp. 905, 906, the court said:

> "The applicability of the three year statute of limitations of Cal. Code of Civil Procedure, § 338(1), see Steiner v. 20th Century-Fox, 9 Cir., 1955, 232 F.2d 190, 194, to this proceeding is not in issue on this motion, and may be assumed for the purposes of this motion to be undisputed."

defendants, who sought review by way of petition for a writ of mandamus.

In a pretrial order thereafter entered, the defendants' statement of trial issues are set forth. No issue concerning the one-year statute of limitations is mentioned in this statement. On the contrary, all issues relating to liability and damages were expressly referenced to the period from May 16, 1947 to May 16, 1950.

In proposed findings of fact submitted by defendants at the end of the trial it was stated, among other things, that the defendants "pleaded various affirmative defenses including the defense that any claim for relief accruing prior to May 16, 1947, was barred by limitations. . . ." Defendants' proposed findings with regard to both liability and damages were related to the 1947 to 1950 period, no findings being proposed with regard to the more limited period of 1949 to 1950.

Defendants attribute their reliance, in the district court, on the three-year statute of limitations, to the general assumption then prevailing, based on the language used by this court in *Steiner* v. *20th Century-Fox Film Corp.*, 9 Cir., 232 F. 2d 190, 194 that the three-year statute is the applicable statute. Defendants argue that later court decisions in other circuits, and a district court decision in this circuit,[48] demonstrate that it is the one-year statute which is applicable. In view of these circumstances, defendants assert, they are entitled to take advantage of this new decisional law and now rely on the one-year statute.

We do not agree. If defendants had urged such a view in the district court they would be in a position to assert it here, even if it involved an overruling of our decision in

[48] *Leh* v. *General Petroleum Corp.*, S. D. Calif. 208 F. Supp. 289, now on appeal in this court.

Steiner. But having invited the asserted error which they contend results from application of the three-year statute, defendants are not now in court on that issue. The view just stated, which is applicable with regard to appellate adjudication generally, is especially applicable with regard to a defense, such as the statute of limitations, which is waived unless asserted.

In order to preserve the point for review defendants were not required to request a finding of fact or conclusion of law dealing with the one-year statute. As defendants point out, Rule 52(a), Federal Rules of Civil Procedure, dispensed with the necessity for such requests in order to preserve a point for review. But defendants were required to adhere to the defense of the one-year statute which they advanced in their answer, so that the court would be obliged to rule thereon. Instead, defendants in effect abandoned that defense, as a result of which there was no ruling upon it. The whole trial was had on the theory, asserted by defendants in their motion for partial summary judgment, that the three-year statute is applicable.

Without reaching the question as to which statute is applicable, we hold that, under the circumstances of this case, the district court did not err in applying the three-year statute.

Tolling the statute of limitations. On the cross appeal, plaintiff contends that the trial court erred in holding that, as to Twentieth Century Fox and National, the three-year statute of limitations began to run on May 16, 1947. Plaintiff argues that, as to these defenda ts, the running of that statute of limitations was, pursuant to section 5 of the Clayton Act,[49] suspended during the pendency of

[49]Section 5 of the Clayton Act at the time this action was commenced was found at 38 Stat. 731 (1914). It was amended in 1955. See 69 Stat. 283, 15 U. S. C. § 16(b) (1958).

United States v. *Paramount Pictures, Inc.*, S. D. N. Y. 66 F. Supp. 323, 70 F. Supp. 53, aff'd in part and rev'd in part, 334 U. S. 131; S. D. N. Y., 85 F. Supp 881, aff'd per curiam 339 U. S. 974.[50]

Section 5 of the Clayton Act is quoted in the margin.[51] The *Paramount* case, in which Twentieth Century Fox and National were defendants, was pending as to them from the time the complaint was filed therein on July 20, 1938, until the decree therein became final as to Twentieth Century Fox and National on October 16, 1950.[52] The action now before us was commenced on May 16, 1950, while the *Paramount* case was still pending. Thus, if plaintiff is correct in his contention, the claim should not have been cut off as to Twentieth Century Fox and National on May 16, 1947, but as of July 20, 1935.[53]

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[50] As stated earlier in this opinion, the district court rejected this view in granting partial summary judgment for defendants. *Samuel Goldwyn Productions, Inc.* v. *Fox West Coast Theatres Corp.*, N. D. Cal. 146 F. Supp. 905.

[51] Section 5 read as follows:

> "Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof." (See note 49 above.)

[52] On June 5, 1950 the Supreme Court affirmed, per curiam, the final judgment of the district court. 339 U. S. 974. Petition for rehearing were denied October 16, 1950. 340 U. S. 857.

[53] This gives effect to the California three-year statute of limitations. A claim accruing on July 20, 1935 would have been barred on July 21, 1938, by operation of the California three-year statute of limitations, unless the running of the statute was suspended on July 20, 1938, by the filing on that day of the complaint in the *Paramount* case. Cal. Code Civ. Proc. § 12.

Section 5 (now section 5[b]), specified circumstances under which the running of the statute of limitations in respect to private rights of action arising under the antitrust laws was suspended during the pendency of a prior Government antitrust proceeding. According to its terms, the tolling provisions of that statute apply where it appears that: (1) the United States instituted a civil or criminal proceeding to prevent, restrain or punish violations of any of the antitrust laws, and (2) the person claiming the benefit of the statute has a private right of action arising under the same laws and "based in whole or in part on any matter complained of" in the Government proceeding.

It is not here disputed that the first of these conditions was met. The *Paramount* case was a civil proceeding instituted by the United States to prevent or restrain violations of sections 1 and 2 of the Sherman Anti-Trust Act. The district court did not hold otherwise.

That court, however, held that plaintiff's right of action, while arising under the antitrust laws, is not "based in whole or in part on any matter complained of" in the *Paramount* case, and that therefore the second condition specified in section 5, as enumerated above, was not met.

In reaching this conclusion the district court decided, from a comparison of the complaints in the two cases that there had been a failure to meet the below-quoted test for determining whether this condition of section 5 had been met, as stated in *Steiner* v. *20th Century-Fox Film Corp.*, 9 Cir., 232 F. 2d 190, 196:

> "The same means must be used to achieve the same objectives of the same conspiracies by the same defendants."

Plaintiff argues that the district court erred in concluding that the quoted *Steiner* test was not met. Plaintiff con-

tends that the Goldwyn action is based in part on one or more of the same conspiracies, combinations, contracts or monopolies, having the same objectives, utilizing the same means, and involving the same defendants complained of in *Paramount*.

As one example of a combination complained of in *Paramount*, which is contended to be similar to one on which the Goldwyn action is based, and which has the same objectives, employs the same means, and involves the same defendants, plaintiff refers to one of the alleged combinations and monopolies referred to in paragraph 170, and succeeding paragraphs, of the amended *Paramount* complaint.

In paragraph 170 it is alleged, among other things, that the parent and subsidiary corporations which form "Fox," constitute a combination and monopoly in restraint of trade, which in and of itself had violated sections 1 and 2 of the Sherman Act. One of the objectives of this combination and monopoly, according to paragraph 174 of that pleading, is to monopolize the business of exhibiting motion pictures in areas serving a substantial percentage of the total population of the United States.[54] According to the same paragraph, the means utilized to achieve that objective was, and is, to acquire and maintain a monopoly of such business in the described areas.

According to paragraph 7(a) of that amended complaint, Twentieth Century Fox is engaged in the business of producing, distributing and exhibiting motion pictures,

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[54]This objective is not expressly stated as such in paragraph 174, but is necessarily to be implied from the allegations of that paragraph concerning the means employed. Paragraph 174 reads:

> "174. By acquiring and maintaining a monopoly of the business of exhibiting motion pictures in areas serving a substantial percentage of the total population of the United States."

either directly or through subsidiary or associated companies. National was the only subsidiary named in that pleading (paragraph 7(b)), it being alleged that National is a holding company for the theatre interests of Twentieth Century Fox. It follows that Twentieth Century Fox and National, both of whom were named defendants in *Paramount*, were at least part of the combination and monopoly referred to in paragraphs 170 and 174 referred to above.

It remains to be determined whether the Goldwyn action is based, at least in part, on that alleged combination and monopoly, having the objectives there alleged, utilizing the means there referred to, and directed against the same defendants.

In paragraph 16 of the Goldwyn complaint it is alleged that the defendants, and others acting in concert with them, have violated and are now violating sections 1 and 2 of the Sherman Act by unlawfully combining to restrain trade and commerce, and by monopolizing such trade and commerce. One of the objectives of this combination and monopoly, according to paragraphs 16(a), 17(a) and 18(a) of the Goldwyn complaint, is to monopolize the business of exhibiting motion pictures.[55] According to the same

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[55] As in the case of the analysis of the *Paramount* pleadings, this objective is not expressly stated as such in paragraphs 16(a), 17(a) and 18(a), but is necessarily to be implied from the allegations of those paragraphs concerning the means employed. The paragraphs in question read:

> "[16.]a. Agreeing to acquire and maintain, and acquiring and maintaining a monopolistic combine of first and subsequent run theatres for the exhibition of motion pictures;"
>
> * * * * * * *
>
> "[17.]a. That defendants by their predatory tactics, hereinafter mentioned, establish, increase, maintain and perpetuate a monopolistic buying combine of motion picture theatres;"
>
> * * * * * * * *
>
> "[18.]a. They acquired an effective monopolistic buying combine by the acquisition, leasing, ownership or management

paragraphs, the means utilized to achieve that objective included the acquisition and maintenance of a monopolistic combine of theatres for the exhibition of motion pictures. Twentieth Century Fox and National, being named defendants in the Goldwyn complaint, were alleged participants in the alleged combination and monopoly referred to above.

Comparing the described combinations and monopolies with their respective objectives, means of accomplishment and participants, as set forth in the amended *Paramount* complaint, and in the Goldwyn case, it would seem that all of the similarities are present which are required to meet the *Steiner* test. But defendants argue that the Goldwyn action is not based in part on this particular combination and monopoly alleged in the *Paramount* case, because, in that case the Government did not allege that the monopoly there charged operated to prevent non-theatre-owning producers from licensing their pictures to theatres of producer-exhibitors on fair and reasonable terms. To the contrary,

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of theatres strategically located throughout the states in which the defendants do business."

In the non-charging paragraphs of the complaint there are other background allegations which tend to substantiate this view as to the objectives of the asserted combination and monopoly. Among these are the following:

"The defendants have combined the tremendous buying power arising out of the control of the theatres to purchase film licenses on a non-competitive and monopolistic basis as hereinafter more fully set forth [Paragraph 11].

"In August of 1925, the parent FOX company, acquired approximately one-third of the common stock of WEST COAST THEATRES, INC., predecessor of the defendant FOX WEST COAST, and in March, 1928, it purchased all of the stock of WESCO CORPORATION (now the defendant NATIONAL), a holding company for theatre operating corporations. From this nucleus FOX WEST COAST and NATIONAL erected the buying combine of operating companies by the predatory means and methods hereinafter alleged." (Paragraph 12)

defendants assert, Goldwyn was there charged with being one of those who fostered the monopoly complained of.

We take it that defendants do not mean to question the sufficiency of these allegations in the amended *Paramount* complaint to state a claim. It was not necessary, to state such a claim, that the Government allege that the participants had a specific intent to exclude, or admit on their terms, Goldwyn or others in his position from the theatres which they controlled.

As stated in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 173, a "specific intent" is not necessary to establish a "purpose or intent" to create a monopoly, but that the requisite "purpose or intent" is present ". . . if monopoly results as a necessary consequence of what was done." Nor was it necessary for the Government to allege that the alleged monopoly power created by the vertical integration in question had actually been exercised.[58]

But what defendants are saying is that, even though these allegations be sufficient to state an actionable combination or monopoly, since it was not alleged that the combination or monopoly there charged operated to prevent non-theatre-owning producers such as plaintiff from licensing their pictures to the theatres controlled by the vertical integration on fair and reasonable terms, that combination and monopoly falls short of, or differs from, the combination and monopoly on which the Goldwyn action is based.

Monopoly power carries with it the power to exclude competition wholly, or to permit competition on terms dictated by the monopoly. In *Paramount*, at page 170, the

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[58]Thus, in *Paramount*, the Supreme Court said, at page 174: ". . . a vertically integrated enterprise, like other aggregations of business units (*United States* v. *Aluminum Co. of America*, 148 F. 2d 416), will constitute monopoly which, though unexercised, violates the Sherman Act provided a power to exclude competition is coupled with a purpose or intent to do so."

Supreme Court stated that a conspiracy to monopolize the business of exhibiting motion pictures, and such fruits of the monopoly as "price," "clearance" and "run" control, are "interdependent." There is, we believe, a like interdependence between the power and purpose to monopolize the exhibition of motion pictures, and control over the terms on which a competing producer will be permitted to exhibit at such theatres. As we view it, the combination and monopoly, allegedly resulting from the vertical integration of Twentieth Century Fox and its subsidiaries was, in essence, the same monopoly and combination described in the Goldwyn complaint.

But, in any event, the tolling statute does not require, and the *Steiner* test does not provide, that all matters complained of in the private action must find a counterpart in the Government action. The private action is only required to be based in part on a matter complained of in the Government suit. The Goldwyn action is based at least in part on an alleged combination and monopoly between Twentieth Century Fox and National having the objective of monopolizing the business of exhibiting motion pictures, such objective being attained by the acquisition and operation of moving picture theatres.

Building on this foundation, plaintiff alleges that this combination and conspiracy has prevented it, as a non-theatre-owning producer, from licensing its pictures to those theatres on fair and reasonable terms. The foundation allegations, which are a substantial and critical part of the Goldwyn case, as so analyzed, related to a combination and monopoly which, in our view, finds substantial similarity in that part of the amended *Paramount* complaint to which reference has been made.

Up to now, our discussion of this point has been predicated upon an analysis of the amended complaint in *Para-*

mount. In the original complaint, filed more than two years earlier, the allegations concerning such a combination and monopoly between Twentieth Century Fox and its subsidiaries are perhaps not as precise. Nevertheless we find therein the essential allegations relating to that combination and monopoly, such that it cannot be said that this matter was complained of for the first time in the amended complaint.[57]

We conclude that the similarity between the combination and monopoly discussed above, as charged in the original and amended complaints in *Paramount,* and as charged

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[57] In the original complaint, as in the amended complaint, National was designated as a subsidiary of Twentieth Century Fox, both being named defendants. Twentieth Century Fox was alleged to be engaged in the business of producing, distributing and exhibiting motion pictures. National was described as a holding company for the theatre interests of the parent company. It was alleged that Twentieth Century Fox was one of the five companies which emerged in the 1920's with production facilities and large theatre holdings. See paragraphs 7(a) and (e), 49, 50 and 126 of the complaint. In paragraph 189 it was alleged, in part:

> "The acquisition of affiliated theatres in different sections and areas of the United States by the producer-exhibitor defendants has resulted in a division of territory between them, so that, in effect, each producer-exhibitor defendant, acting in combination with the other defendants herein, has an independent monopoly of the market for the first-run exhibition of motion pictures in the respective area, or areas, where each operates. . . ."

In paragraph 198 of the original complaint it was alleged:

> "(198) The monopolization of the exhibition of quality films on first or preferred runs in all sections of the United States where affiliated theatres operate or exist has been brought about by the producer-exhibitor defendants herein through the instrumentality of the ownership, operation and control of affiliated theatres, and as such instrumentality, as aforesaid, theatre ownership and control, coupled with the control of production by the producer-exhibitor defendants, or any of them as hereinafter alleged is illegal as violative of the Sherman Anti-Trust Act."

in the Goldwyn complaint, is such that the *Steiner* test has been fully met.[58]

We are not certain whether it was in applying the *Steiner* test, or in advancing what may have been regarded as a separate reason for holding that plaintiff is not entitled to the benefit of the tolling statute, that the statement was made by the district court that plaintiff was not within the "target area" of the *Paramount* case. The "target area" phrase, as the district court indicated, came from the decision of this court in *Karseal Corp.* v. *Richfield Oil Corp.*, 9 Cir., 221 F. 2d 358, 362.

Karseal was not concerned with the question before us as to the application of the tolling statute, but with the wholly different question of whether the complaint in that case stated a claim under the antitrust laws. A private antitrust suit by Karseal Corporation, a manufacturer of an automobile polish, had been dismissed on the ground that an alleged restraint of trade as to the sale of accessories, exercised by Richfield Oil Corporation upon service stations was not, under the pleadings, a proximate cause of the damage the manufacturer claimed to have suffered.

In reversing, this court held that, contrary to the view of the district court, the manufacturer was within the "target area" of the alleged restraint, and therefore had stated an actionable claim. Discussing what it meant by "target area," this court, in *Karseal*, referred to it as a factor in determining whether there was proximate causa-

[58]It is therefore unnecessary for us to decide whether this is likewise true with regard to conspiracies to exclude independently produced films from affiliated theatres, as charged in other sections of the *Paramount* complaint. Nor, in view of the disposition which we have made of this matter, do we find it necessary to pass upon plaintiff's contention that the *Steiner* case was wrongly decided. The cogent arguments made in support of that contention we leave for determination in some future litigation in which such a decision may be required.

tion. At two places in that opinion, there is language indicating that one was not in the "target area" unless he was "aimed at" by the conspirators.

But in using the words "aimed at" this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather, it was intended to express the view that the plaintiff must show that, whether or not then known to the conspirators, plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy. This is made clear by our quotation, in *Karseal*, of this excerpt from the opinion in *Conference of Studio Unions* v. *Loew's Inc.*, 9 Cir., 193 F. 2d 51, 54-55:

> "A conspiracy may have many purposes and objects; the conspirators may perform an almost infinite variety of acts in furtherance of the conspiracy; but, in order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws."

Assuming, but not deciding, that this "target area" concept is relevant in determining whether the plaintiff in a private anti-trust suit may claim the benefit of section 5 of the Clayton Act, plaintiff was within that area under the allegations of his complaint. As one which desired to exhibit motion pictures which it produced, plaintiff was

within the area of the economy which was endangered by the alleged combination and monopoly with regard to the exhibition of moving pictures.

We conclude that the district court, in the 1956 ruling which Judge Harris was required to follow when the case was later assigned to him, erred in holding the tolling statute inapplicable as to all defendants. In our opinion, it was applicable as to defendants Twentieth Century Fox and National and, as to them, plaintiff should not have been limited to claims arising on and after May 16, 1947.

Attorneys' Fees

Having rendered a judgment for damages in favor of plaintiff, it was the duty of the district court to allow plaintiff a reasonable attorneys' fee. See section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15 (1958). That court fixed plaintiff's attorneys' fees in the amount of $100,000, this being also the amount of the award of actual damages.

We have heretofore, in this opinion, considered and disposed of all of defendants' points on appeal except those relating to attorneys' fees and other court costs. Accordingly, the award of $100,000 actual damages, tripled to $300,000 has been sustained, and plaintiff's right to attorneys' fees has been confirmed. Defendants, however, contend that the allowance of $100,000 attorneys' fees is excessive, and that no more than $25,000 should have been awarded.

The amount of attorneys' fees to be allowed in connection with an award of damages in an antitrust suit is within the discretion of the trial court, reasonably exercised, and will not be disturbed absent an abuse of discretion. *Montague*

& Co. v. Lowry, 193 U. S. 38, 48. We may, however, have somewhat more latitude in determining whether there has been an abuse of discretion than would be true in the usual case, since the judge who fixed the fee came into the case after most of the legal services had been rendered. See *Monaghan* v. *Hill*, 9 Cir., 140 F. 2d 31, 34.

In *Noerr Motor Freight, Inc.* v. *Eastern Railroad Presidents Conference*, E. D. Pa., 166 F. Supp. 163, 168-169, aff'd, 7 Cir. 273 F. 2d 218, rev'd on other grounds, 365 U. S. 127, there are listed some of the factors which have been considered by the courts in making an award of a reasonable attorneys' fee in an antitrust suit, or in reviewing such an award on appeal. As there listed, these factors include: (1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government, (2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel, (3) time and labor spent, (4) magnitude and complexity of the litigation, (5) responsibility undertaken, (6) the amount recovered, (7) the knowledge the court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiffs prior to trial, (8) what it would be reasonable for counsel to charge a victorious plaintiff, and (9) what contribution shall be made by the defendant toward the fees of plaintiff's counsel.

While all or most of these factors are useful as guides in fixing such fees, they provide nothing approaching a precise yardstick. In the long run, the weight to be accorded these and other factors in fixing the fees in a particular case must rest largely upon the good judgment of the district court.

Such fees are usually fixed at a level substantially below the amount of actual damages awarded. There are, how-

ever, cases in which the fee exceeded, or very nearly equaled the damage award.[59] There is no doubt that counsel for plaintiff did a prodigious amount of work in preparing this case for trial, and in trying it.[60] Defendants do not contend to the contrary. They do question the necessity for much of this work. However, this is almost like saying that plaintiff could have won more easily—a not very telling argument when made by those who contend that plaintiff should not have won at all.

The lawsuit was most vigorously contested from beginning to end. Numerous complex legal and factual issues were involved. The principles established and elements of proof developed have significance beyond the amount of the damage award. They are, to a considerable extent, pertinent to plaintiff's further proceedings against Twentieth Century Fox and National, authorized herein, in prosecution of the claim for damages covering the years 1935 to 1947.

We conclude that, under all of the circumstances of this case, the award of attorneys' fees in the sum of $100,000 does not manifest an abuse of discretion. Should plaintiff recover additional damages in the further proceedings to be had herein, the district court will undoubtedly

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[59] In the *Webster Car Co.* case, Judge Holtzoff, using a number of previous antitrust suits as guides, concluded that an allowance of from twenty-three to twenty-four per cent of the single damages would constitute a reasonable fee. On the other hand, plaintiff calls attention to the fees allowed in nine cases, in five of which the amount exceeded or nearly equaled the damage award. In plaintiff's remaining four cases, the fee ranged from thirty-four per cent to sixty-seven per cent of the single damages.

[60] Plaintiff's attorneys expended approximately 12,912 hours to and including the trial of the case. The $100,000 fee awarded represents something less than eight dollars an hour for this much time.

take into consideration, in allowing further attorneys' fees, the size of the allowance already made and the extent to which services already rendered are utilized in the further proceedings.

Plaintiff asks for an award of reasonable attorneys' fees on this appeal in the event of affirmance. Defendants do not oppose this request.

We find and determine that $5,000 is a reasonable sum to be awarded plaintiff for attorneys' fees on this appeal. That sum shall be included and taxed as part of the costs in this court.[61]

ASSESSMENT OF COSTS

After entry of judgment but before the appeal and cross appeal were taken, plaintiff claimed costs in the sum of $154,080.12. Defendant filed objections to the cost bill as a whole, and as to individual items comprising a major part of the claimed costs. The clerk of the district court allowed costs in the amount of $5,955.15.

Plaintiff initiated proceedings in the district court to review the clerk's action. These proceedings were pending when the main appeal and the cross appeal were taken. Thereafter, the district court taxed costs at $66,507.31. Defendants thereupon appealed from this order.

Defendants argue that the major amount of the costs, as fixed by the district court, relate to expenditures which are not recoverable as "costs," and which are not of a kind which the district court could, in its discretion allow. Before we can reach this argument, however, we must deal

[61] See *American Crystal Sugar Co.* v. *Mandeville Island Farms, Inc.*, 9 Cir., 195 F. 2d 622, 626; *North Texas Producers Ass'n* v. *Young*, 5 Cir. 308 F. 2d 235, 246.

with plaintiff's intimation that the order of the district court taxing costs may not be appealable.[62]

The rule which plaintiff seeks to invoke is, that a judgment for costs only is not appealable except as to the issue of the power of the court to assess costs.[63] Since defendants here question only the power of the court to allow certain items of costs, and not the court's discretion in fixing the amount of allowable costs, this appeal from the order fixing costs falls within the exception to the rule on which plaintiff relies. Moreover, this appeal from the order fixing costs is so related to the general judgment on appeal which was then pending, that it should be considered an inseparable part thereof, and not an appeal from an order for costs only in the usual sense.

We hold that the order in question is appealable.

Plaintiff claimed accounting fees in the sum of $117,781.58, made up of the items listed in the margin.[64] Defend-

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[62]Plaintiff does not categorically assert that the order is not appealable, indicating only that appealability is "doubtful."

[63]The rule is so stated in *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, 83, and many other cases. However, there are other decisions, including the decision of this court in *Komart Corp.* v. *Printing Arts Research Lab., Inc.*, 9 Cir., 232 F. 2d 897, 898, where a judgment for costs only has been held not appealable except where the power or right of the court to assess certain items of costs is in dispute, *or* where there is a claim as to abuse of discretion. The latter version of the rule would seem to encompass any ground on which an appeal would normally be based. See 6 Moore's Federal Practice, 2d ed., § 54.70(5), pages 1308-1313, for a review of the cases.

[64]"4. Accounting Fees:

"(a) Joseph A. Walsh (10-30-54 to 8-19-60)	$71,850.00
(b) Price Waterhouse & Co. (5-2-55 to 1-58)	36,929.50
(c) Comptometer Operators (1-56 to 3-58)	6,757.95
(d) Office Machines, Inc. (1-24-56 to 12-28-57) (Accounting machine rental)	1,869.13
(e) Marchant Co. (11-54 to 1-56) (Accounting machine rental)	375.00"

ants made several specific objections to these claimed accounting fees. The district court disallowed the $71,850. item representing the accounting fees of Joseph A. Walsh, and allowed the remaining accounting items in the total amount of $45,931.58.

Defendants argue that accounting fees are not allowable "costs" within the meaning of Rule 54(d), Federal Rules of Civil Procedure.[65] *Union Carbide & Carbon Corp. v. Niseley*, 10 Cir. 300 F. 2d 561, 586, so holds.[66]

But plaintiff calls attention to the fact that, in providing for this item of recovery, section 4 of the Clayton Act, 15 U. S. C. § 15, uses the words: ". . . the *cost* of suit, including

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[65]Rule 54(d) reads:

"(d) **Costs.** Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one days' notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

28 U.S.C. § 1920, which is also relevant, reads:

"**§ 1920. Taxation of costs**

"A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

"A bill of costs shall be filed in the case and upon allowance, included in the judgment or decree."

[66]To the same effect, see *Clapper v. Original Tractor Cab Co.*, S. D. Ind. 165 F. Supp. 565, 599, reversed on other grounds, 7 Cir., 270 F. 2d 616.

a reasonable attorney's fee," (emphasis supplied), while Rule 54(d) refers to "costs." Plaintiff also makes reference to the legislative history of section 7 of the Sherman Act, 26 Stat. 209 (1890), which was the forerunner of section 4 of the Clayton Act, and other materials. Based thereon, plaintiff argues that, in private antitrust actions a prevailing plaintiff is not limited to costs as contemplated by Rule 54(d) and 28 U. S. C. § 1920, but is entitled to "costs as between solicitor and client" in all such actions.

This same contention, in substance, was rejected in *Straus v. Victor Talking Mach. Co.*, 2 Cir., 297 Fed. 791, 806. In the more recent case of *Brookside Theatre Corp. v. Twentieth Century Fox Corp.*, W. D. Mo. 11 F. R. D. 259, 265, modified (by reducing the attorneys' fees allowed), in 8 Cir., 194 F. 2d 846, 858, it was held that there are no special or peculiar rules for antitrust actions and "the amounts allowed as costs of suit should reasonably conform to what is commonly understood to be the 'cost of suit.'" The *Union Carbide* case, referred to above, reached the same result.

Plaintiff further argues that this court has heretofore sanctioned the awarding of costs to cover accounting fees, citing *Monaghan v. Hill*, 9 Cir., 140 F. 2d 31, 34-35.

Monaghan was not an antitrust suit, but was a class suit in which a fund had been created for the benefit of a class. The court held that the expenses of creating the fund, including accounting fees, were payable out of the funds recovered for the members of the class who accept the benefits. The expenses allowed were not an additional amount assessed against the defendant.[67]

[67]Costs against a defendant, in addition to those enumerated in 28 U.S.C. § 1920, are allowable in certain kinds of actions sounding in equity. See *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 164.

We hold that the only costs recoverable by a successful plaintiff in a private antitrust suit are those which are normally allowable under 28 U. S. C. § 1920 and Rule 54(d), and that such costs do not include accounting fees. The allowance herein of $45,931.58 for accounting fees was improper and is set aside.[68]

Defendants object, on various grounds, to the allowance of costs for the expense of reproducing documents by photostating or otherwise, the expense of a second copy of the transcript of the trial for the use of plaintiff's counsel, the expense of transcribing arguments, pretrial proceedings and the like, witness fees in one instance, and an item for "expressage for Exhibits and Documents," allowed in the sum of $479.

We think that the allowance of the expense for "expressage" as costs was improper. The other items referred to above, were allowable and, under the circumstances of this case, the amounts allowed do not manifest an abuse of discretion.

Admissibility of Findings and Conclusions Made and Sustained in the Paramount Case

We have now disposed of all questions raised on defendants' appeal, and two of the three questions raised on the cross appeal. The final question presented on the cross appeal relates to the ruling of Judge Murphy excluding from the evidence received at the trial certain findings of fact

[68] It is unnecessary for us to consider defendants' additional contentions that the allowance for accounting fees was improper because the fees were not authorized by the court before they were incurred, and because there was assertedly no showing what the accounting services were or to what extent the product thereof was used at the trial.

and conclusions of law entered in *United States* v. *Paramount Pictures, Inc.*, S. D. N. Y., 70 F. Supp. 53, and thereafter sustained by the Supreme Court, 339 U. S. 974.

In paragraphs 20 and 23 of the complaint herein, certain facts were alleged concerning the *Paramount* case. These allegations were intended to provide a foundation in the pleadings for the introduction in evidence, as against Twentieth Century Fox and National who were defendants in *Paramount*, of certain of the findings of fact and conclusions of law entered in that case. In following this course plaintiff sought to take advantage of the first paragraph of section 5 of the Clayton Act, 38 Stat. 731 (1914).[69]

On September 15, 1950, and before any answer was filed, defendants filed a notice of motion "to strike and/or for a more definite statement." This motion was directed exclusively to paragraphs 20 to 23 of the complaint, referred to above. It was asserted, in effect, that under the facts

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[69]Prior to the 1955 amendment, section 5 of the Clayton Act read, in part:

> "Sec. 5. . . . [A] final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, This section shall not apply to consent judgments or decrees entered before any testimony has been taken; Provided further, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken."

The text of the present section 5(a) is now found at 69 Stat. 283 (1955), 15 U. S. C. § 16(a) (1958).

alleged in the complaint, and upon a proper construction of section 5 of the Clayton Act, the final judgment or decree rendered in the *Paramount* case does not, as contended for by plaintiff, constitute prima facie evidence against defendants on the question of violation of the antitrust laws.

This motion was heard on September 25, 1950 by The Honorable Michael J. Roche, who was then sitting as presiding judge in the master calendar department of the district court. On October 9, 1950, Judge Roche denied the motion "at this time."

On June 14, 1956 plaintiff served on the Fox defendants, and filed, a motion for a pretrial conference, one purpose being to obtain a ruling as to the admissibility, as against Twentieth Century Fox and National, of the judgments, findings of fact and decrees in the *Paramount* case. This motion was argued before Judge Murphy who, on October 3, 1956, entered an order holding that the judgments, findings of fact and decrees in the *Paramount* case were inadmissible in evidence in this case.[79] During the course of the trial before Judge Murphy, the *Paramount* judgments, decrees, findings and conclusions were offered in evidence by plaintiff, but were rejected on the basis of the court's prior ruling.

Without the benefit of these *Paramount* documents, plaintiff has nevertheless established liability as to all defendants covering the years 1947 to 1950. It follows that the exclusion from the evidence of the *Paramount* findings and conclusions has not prejudiced plaintiff as to those years.

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[79] At the same time, Judge Murphy granted the motion for partial summary judgment referred to above opposite note 9. The views of Judge Murphy on both motions are expressed in his reported opinion of October 3, 1956. *Samuel Goldwyn Productions, Inc.* v. *Fox West Coast Theatre Corp.*, N. D. Cal., 146 F. Supp. 905.

But we have held that plaintiff is entitled to proceed with its claims against Twentieth Century Fox and National for the years 1935 to 1947. It is therefore appropriate to decide now, for the guidance of the district court in the further proceedings, whether the *Paramount* findings and conclusions are admissible as against those defendants in the further proceedings.

Section 5 (now section 5[a]), states a rule of evidence with respect to final antitrust judgments or decrees in favor of the United States. It provides, with exceptions not here material, that in a subsequent private antitrust suit, any such final judgment or decree shall be admissible as evidence, and constitute prima facie proof against the defendant, ". . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties. . . ." to the predecessor Government antitrust suit.

The "matters" referred to in this statute are the direct determinations of fact and law against the defendant in the prior suit on questions there distinctly put in issue. See *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 569. If any such determinations, considered as evidence, would be relevant with regard to any issue of fact and law in a subsequent treble-damage action involving the same defendant, they are admissible, under section 5, as prima facie evidence of the fact or law so determined.

In *Emich*, the prior Government action had been tried before a jury, which returned a general verdict. As the court stated in that case, a general verdict of the jury or judgment of the court without special findings does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy. Thus the only matter concerning which the judgment in that Government case could be regarded as prima facie evidence,

was the general conspiracy for the purpose of monopolizing the financing of General Motors, and its effectuation by coercing General Motors dealers to use GMAC.

But the *Paramount* case was tried to the court without a jury and detailed findings of fact and conclusions of law were made and obtained finality when thereafter sustained on appeal. As to each of these findings of fact and conclusions of law, Twentieth Century Fox and National would be estopped in any subsequent action against them by the Government. Plaintiff was accordingly entitled, under section 5, to introduce in evidence any of the *Paramount* findings and conclusions which were adverse to Twentieth Century Fox or National, and which are relevant to any of the issues in Goldwyn case, as prima facie evidence supporting plaintiff's position on those issues.[71]

In plaintiff's opening and reply briefs on the cross appeal there are set forth a number of findings of fact and conclusions of law entered and sustained in the *Paramount* case which, plaintiff contends, are adverse to Twentieth Century Fox or National and relevant to issues of fact or law involved in the Goldwyn case. Defendants have not, in their brief, discussed these particular *Paramount* findings or conclusions, or their relevancy to the issues of the Goldwyn case. They have, instead, directed their argument mainly to the broad question of the proper construction of section 5, an argument rejected by what we have already said.

Because there has thus been no meeting of arguments on the question of what *Paramount* findings and conclusions, sustained on that appeal, are adverse to Twentieth Century

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[71] In *Emich*, at page 568, the court said:

> "We think that Congress intended to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit.

Fox or National, and which of these adverse findings and conclusions, if any, are relevant to any issue in the Goldwyn case, we will not attempt to decide these matters on this appeal. In the further proceedings to be had against these two defendants, the district court will be able to deal with this problem in keeping with the principles stated in this opinion. It need only be added that, in our view, the fact that at an early stage of the *Paramount* case, Samuel Goldwyn, as an individual, was named as a defendant and co-conspirator, has nothing whatever to do with the applicability of section 5 in the Goldwyn case.

* * * * * * *

As to Fox West Coast Theatres Corporation and Fox West Coast Agency Corporation, the judgment is affirmed on the appeal and the cross appeal, except that the allowance of accounting fees and express charges as court costs is set aside.

As to Twentieth Century Fox and National, the judgment insofar as it adjudicates claims for the period from May 16, 1947 to May 16, 1950, is affirmed on the appeal and cross appeal, with the same exceptions as to accounting and express fees, and shall be regarded as a partial judgment. Insofar as the judgment dismisses claims for the period prior to May 16, 1947, the judgment as to Twentieth Century Fox and National is reversed on the cross appeal and the cause is remanded for further proceedings consistent with this opinion.

Plaintiff will recover ninety per cent of its cost in this court together with an attorneys' fee in the sum of $5,000.

(Endorsed) Opinion Filed Jan. 24, 1964.

Frank H. Schmid, Clerk.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17725

TWENTIETH CENTURY-FOX FILM CORPORATION, et al.,
Appellants,

vs.

SAMUEL GOLDWYN, et al.,
Appellees.

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be and hereby is as to Fox West Coast Theatres Corp., and Fox West Coast is affirmed on the appeal and cross-appeal except that the allowance of accounting fees and express charges as court cost is set aside. As to Twentieth Century and National the judgment

insofar as it adjudicates claims for the period from May 16, 1947 to May 16, 1950, is affirmed on the appeal and cross appeal, with the same exceptions as to accounting and express fees, and shall be regarded as a partial judgment. Insofar as the judgment dismissed claims for the period prior to May 16, 1947, the judgment as to Twentieth Century and National is reversed on the cross-appeal and the cause is remanded for further proceedings consistent with the opinion of this court, plaintiff to recover ninety (90) per cent of its cost in this court together with an attorneys' fee in the sum of $5,000.

Filed and entered January 24, 1964

APPENDIX B

Excerpts of Material From *United States* v. *Paramount*

Paragraphs from the Petition in the Paramount Case

(12) (a) United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in distribution of motion pictures in various parts of the United States and in foreign countries. [25]

(b) Of the individual defendants, Attilio H. Giannini is President, a Director and Chairman of the Board of Directors, George J. Schaefer, Harry D. Buckley and Arthur W. Kelly are Vice-Presidents, Lloyd Wright is Secretary and Harry J. Muller is Treasurer, of said defendant United Artists Corporation; Mary Pickford is First Vice-President and a Director, Dennis F. O'Brien is General Counsel and a Director, Edward C. Raftery is Assistant Secretary and a Director, and Charles Chaplin, Douglas Fairbanks and Samuel Goldwyn are Directors, of the said defendant United Artists Corporation. As such officers, said individual defendants actively participate, and have participated, in the direction and management of the business and affairs of the said parent corporation, United Artists Corporation. [26]

* * * *

(59) *Producer.*—This term includes, without limitation, all persons, partnerships, associations and corporations who engage or contract to engage in the production of motion pictures.

(60) *Major producer.*—A major producer is one of the eight parent companies defendants herein. Strictly speaking, however, the defendant United Artists Corporation is a distributor rather than a producer.

Paragraphs from the Amended Complaint in the Paramount Case

(61) *Independent producer.*—A producer who is not in any way affiliated with the major producers. [46]

* * * *

(80) *Distributor.*—A distributor is a person, firm or corporation engaged in the business of licensing the exhibition of motion pictures and distributing the positive prints of these motion pictures to the exhibitors whom it licenses to exhibit them. The prints are usually licensed to the exhibitor. However, the arrangement is frequently referred to in the industry as a sale.

(81) *Major Distributor.*—A distributor who is one of the eight parent companies defendants herein.

(82) *Independent Distributor.*—A distributor who is not in any way affiliated with the major distributors. [50]

* * * *

14. The following terms when used in this complaint have the meaning indicated:

PRODUCTION

15. (a) *Producer.*—Any person, partnership, association or corporation engaged in the production of motion pictures.

(b) *Major Producer.*—One which produces motion pictures for release by a major distributor pursuant to a prior understanding or agreement with such major distributor.

Paragraphs from the Amended Complaint in the Paramount Case

(c) *Independent Producer.*—One which is not a major producer. [8]

* * * *

16. (a) *Distributor.*—Any person, partnership, association or corporation engaged in the business of licensing motion pictures for exhibition and distributing the positive prints of such motion pictures to exhibitors.

(b) *Major Distributor.*—A distributor which is a defendant herein or is controlled by a defendant herein.

(c) *Independent Distributor.*—One which is not a major distributor.

(d) *State Rights Distributor.*—An independent distributor which does not operate a system of national exchanges but buys from an independent producer the exclusive right to distribute its pictures in a particular state or territory. [9]

* * * *

84. United Artists now distributes pictures for the following producers among others: Samuel Goldwyn, Charles Chaplin, Mary Pickford, Alexander Korda, and London Film Productions, Ltd., Selznick International, Edward Small, Sol Lesser, Hal Roach, David Loew, Ernest Lubitsch, Walter Wanger, and Richard Rowland. [32]

85. United Artists maintains exchanges in 26 cities.

86. The corporation is owned by five stockholders, Charles Chaplin, Samuel Goldwyn, Mary Pickford, the Estate of Douglas Fairbanks, and Alexander Korda. It issues no public statement of gross assets or business done, but for the fiscal year ended in 1939 its gross income exceeded $10,000,000. [33]

Excerpts from the Caskey Affidavit Relating to Pre-Trial Statements by the Government in the Paramount Case

21. Interrogatory 1(b) inquired as to all documents relied upon by the government to sustain the charge contained in Paragraph 17-4 of the Petition that certain defendants had attempted to monopolize and had monopolized the exhibition of motion pictures in first-run metropolitan theatres. The Government listed and described 540 exhibition licenses as containing facts relied upon by it. Among the documents so listed were a number which dealt with the licensing of Goldwyn pictures.

* * * *

22. I identify below the agreements listed by the Government which are described as relating to the licensing of the Goldwyn productions in theatres affiliated with *Paramount* case defendants.

UNITED ARTISTS CONTRACTS WITH THEATRES AFFILIATED WITH PARAMOUNT

	Date of Contract	Distributor	Exhibitor	Period Covered
186.	1/17/39	United Artists Corp. (1 Samuel Goldwyn Production) * * *	Saenger Theatres, Inc.	1938-39 Season
194.	12/ 1/38	United Artists Corp. (2 Samuel Goldwyn Productions) * * *	Interstate Circuit, Inc.	1938-39 Season
211.	12/22/38	United Artists Corp. (4 Samuel Goldwyn Productions) * * *	Minnesota Amusement Co.	1938-39 Season
223.	12/22/38	United Artists Corp. (4 Samuel Goldwyn Productions) * * *	Minnesota Amusement Co.	1938-39 Season
229.	10/22/38	United Artists Corp. (4 Samuel Goldwyn Productions) * * *	Tri-States Theatre Corp.	1938-39 Season
235.	9/30/38	United Artists Corp (4 Samuel Goldwyn Productions)	Intermountain Theatres, Inc.	1938-39 Season

Excerpts from the Caskey Affidavit Relating to Pre-Trial Statements by the Government in the Paramount Case

UNITED ARTISTS CONTRACTS WITH WARNER BROS. THEATRES

	Date of Contract	Distributor	Exhibitor	Period Covered
480.	10/24/38	United Artists Corp. Covers exhibition of Samuel Goldwyn production in the Warner circuit.	Warner Bros.	1938-39 Season

UNITED ARTISTS CONTRACTS WITH FOX THEATRES.

	Date of Contract	Distributor	Exhibitor	Period Covered
537.	4/11/39	United Artists Corp. Covers move over exhibition of one Samuel Goldwyn production.	Fox West Coast Theatres	1938-39 Season

23. Interrogatory 2(b) inquired as to the Government's charges contained in Paragraph 174 of the petition that certain defendants had combined with each other and with the producer-distributor defendants and with the distributor defendant (United Artists) to monopolize the market for the exhibition of motion pictures in certain theatres. In its answer the Government incorporated by reference its answer to Interrogatory 1(b).

24. Interrogatory 8 inquired as to charges which were contained in Paragraphs 186 and 190 of the petition that certain defendants had attempted to monopolize and had monopolized first or preferred run exhibition of motion pictures throughout the United States wherever any theatres affiliated with any one or more of the defendants operated or existed. The Government's answer to this interrogatory incorporated again by reference its answer to

Excerpts from the Caskey Affidavit Relating to Pre-Trial Statements by the Government in the Paramount Case

Interrogatory 1(b) . . . and listed 500 additional documents which it claimed supported its charge. Among the documents so listed were many which related to Goldwyn pictures. * * * I identify below the agreements listed by the Government which are described as relating to the licensing of Goldwyn productions in theatres affiliated with *Paramount* case defendants:

UNITED ARTISTS CONTRACTS WITH THEATRES AFFILIATED WITH PARAMOUNT

	Date of Contract	Distributor	Exhibitor	Period Covered
314.	12/ 1/38	United Artists Corp. (3 Samuel Goldwyn Productions)	Texas Consolidated Theatres, Inc.	1938-39 Season
315.	12/ 2/38	United Artists Corp. (3 Samuel Goldwyn Productions)	Texas Consolidated Theatres, Inc.	1938-39 Season
330.	12/31/38	United Artists Corp. (4 Samuel Goldwyn Productions)	Jefferson Amusement Co.	1938-39 Season
336.	9/30/38	United Artists Corp. (4 Samuel Goldwyn Productions)	Intermountain Theatres, Inc.	1938-39 Season
342.	9/30/38	United Artists Corp. (4 Samuel Goldwyn Productions)	Intermountain Theatres, Inc.	1938-39 Season
348.	9/30/38	United Artists Corp. (4 Samuel Goldwyn Productions)	Intermountain Theatres, Inc.	1938-39 Season
354.	9/30/38	United Artists Corp. (4 Samuel Goldwyn Productions)	Intermountain Theatres, Inc.	1938-39 Season
360.	9/30/38	United Artists Corp. (4 Samuel Goldwyn Productions)	Paramor Theatre Co.	1938-39 Season

Excerpts from the Caskey Affidavit Relating to Pre-Trial Statements by the Government in the Paramount Case

	Date of Contract	Distributor	Exhibitor	Period Covered
366.	9/30/38	United Artists Corp. (4 Samuel Goldwyn Productions)	Menmar Theatre Co.	1938-39 Season
372.	9/30/38	United Artists Corp. (4 Samuel Goldwyn Productions)	Intermountain Theatres, Inc.	1938-39 Season

WITH RKO THEATRES

	Date of Contract	Distributor	Exhibitor	Period Covered
483.	1/16/39	United Artists Corp. (4 Samuel Goldwyn Productions)	RKO	1938-39 Season
488.	9/13/38	United Artists Corp. (4 Samuel Goldwyn Productions)	RKO	1938-39 Season
494.	9/13/38	United Artists Corp. (4 Samuel Goldwyn Productions)	RKO	1938-39 Season

25. Defendants' Interrogatory 9 inquired as to the charge contained in Paragraphs 186 to 190 of the Government petition that certain defendants had combined and conspired with each other and with the producer-distributor defendants and with the distributor defendant (United Artists) to monopolize the first or preferred run exhibition of motion pictures throughout the United States wherever any theatre affiliated with one of the defendants operated or existed. In its answer to this interrogatory, the Government incorporated by reference its answers to Interrogatories 1(b) and 8(b), referred to and identified above, as containing the documentary evidence upon which it intended to rely. * * *

Excerpts from the Caskey Affidavit Relating to Pre-Trial Statements by the Government in the Paramount Case

26. Interrogatory 6 inquired as to the charge contained in Paragraph 182 of the Government petition that the defendants made their pictures available for exhibition in first-run theatres of the defendants to the exclusion of the motion pictures of all other producers. The Government's answer incorporated its answers to Interrogatories 1(b) and 8(b) which are identified above.

* * *

27. Interrogatory 7 inquired as to the charges contained in Paragraphs 120, 121 and 183 of the Government's petition that certain defendants had dominated, controlled and monopolized the market for the exhibition of motion pictures in first-run metropolitan theatres throughout the United States and that the incentive to "independent" production had been decreased by reason of the inability of "independent" producers to gain access to that market. In answer, the Government again incorporated by reference its answers to Interrogatories 1(b) and 8(c) which are identified above.

* * *

28. Interrogatories 3 and 4 inquired as to charges that independent producers had been excluded from defendants' theatres and had attempted to license pictures to defendants' theatres and been refused. Respecting the identity of the producers whom the Government claimed had been so excluded, the Government answers listed the names and addresses of twenty-two persons. Goldwyn's name was not listed.

* * *

Later, the Government filed additional answers to these interrogatories. It set forth additional names of individuals engaged in some phase of the production or distribution business whom it claimed had been affected, together with a statement of the testimony which it asserted would be elicited from these individuals if called as witnesses. Goldwyn was not listed.

* * *

The Expediting Court referred to master agreements and franchises as unlawful trade practices, as follows (66 F. Supp. 323, 338):

> "As further evidence of a conspiracy among the distributors to fix prices, we find master agreements and franchises between various of the defendants in their capacities as distributors and various of the defendants in their capacities as exhibitors. These contracts stipulate minimum admission prices often for dozens of theatres owned by an exhibitor-defendant in a particular area of the United States.
>
> * * *
>
> "A master agreement between United Artists as distributor and Fox as exhibitor for the season 1938-39 covered distribution of pictures of five independent producers in Fox theatre circuits in Los Angeles, San Francisco, Salt Lake City, St. Louis, Milwaukee, Omaha, Denver, and other cities, all on a percentage basis. It contained the following clause: 'Where pictures are licensed on a percentage rental basis the scale of admission prices to be not less than the scale of admission prices charged to view pic-

tures of comparable quality exhibited by the exhibitor and distributed by distributors other than United Artists.' The foregoing quotation shows an acquiescence of United Artists in admission prices fixed by any other distributor and an adherence to those prices in its own licenses. Plaintiff's Exhibit 199."*

And further with respect to formula deals made by RKO and Paramount (60 F. Supp. 323, 346-47):

> "Formula deals, certain master agreements, and franchises have tended to restrain trade in the distribution and exhibition of motion picture features and in view of the history and relation to the moving picture business of the various parties to this action have exercised unreasonable restraints."

Goldwyn's consent to Government Exhibit 195, a ten year franchise between United Artists Corporation and Publix Theatres Corporation (Paramount) reads:

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*In the above-quoted portion of the court's opinion there is the statement that the master agreement covered the distribution by United Artists of the pictures of five independent producers. Read in context it, of course, is obvious that the court was not using the term "independent producer" in the particular sense that it was defined by the Government or used throughout the *Paramount* case. Rather, it was merely pointing up the fact that United Artists did not produce the pictures which it distributed and which, as the Government had charged, were the pictures produced primarily by those who were the stockholders of United Artists. And it must be plain that the court was not using the term "independent producer" in any sense as referring to producers who had been excluded from or denied access to affiliated theatres, for the exhibit itself was used by the court to illustrate unlawful licensing practices attaching to these four pictures in these very affiliated theatres.

Government Exhibits at the Trial of the Paramount Case

"Each of the undersigned producers, whose motion pictures or photoplays are now being distributed by United Artists Corporation, a Delaware corporation, pursuant to now existing contracts between that corporation and the undersigned, having read the provisions of the attached contract entered into between United Artists Corporation and Publix Theatres Corporation, dated as of the Third day of February, 1928, does hereby approve all of the provisions of the aforesaid contract as they affect the distribution and exhibition of the motion pictures of the undersigned distributed by United Artists Corporation pursuant to now existing contracts between that corporation and the undersigned and consent to its terms, conditions and provisions relative to the exhibition of the undersigned's motion pictures or photoplays in the theatres of the Publix Theatres Corporation as set forth in Schedule 'A' of said contract.

"Dated, February 4th, 1928.

SAMUEL GOLDWYN,

By /s/ Samuel Goldwyn (signed)

SAMUEL GOLDWYN, INC.,

By /s/ Samuel Goldwyn (sgnd)
Pres."

Government Exhibits at the Trial of the Paramount Case

Exhibit 195 was singled out for condemnation by the Expediting Court, as follows (66 F. Supp. 323, 352):

> "These provisions [that is, the discriminations referred to in the preceding paragraph of the opinion, among them being the exclusion of 'foreign pictures and those of independent producers'] are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres. Record pp. 1432, 1433; Columbia's Exhibit 9a; Universal's Exhibit 2; Plaintiff's Exhibits 195, 198, 259, 261, 265-266a, 384, 396, 470-473."

Excerpt from Government Exhibit 93:

Picture	Billings	Total Rental
UP IN ARMS (Goldwyn)	10,149	$2,751,693
LADY TAKES A CHANCE (Ross)	13,987	1,955,781
TENDER COMRADE (RKO)	11,733	1,825,300
NORTH STAR (Goldwyn)	10,141	1,759,419
SHOW BUSINESS (RKO)	11,780	1,703,990
GOVERNMENT GIRL (RKO) ..	12,507	1,628,005
STEP LIVELY (RKO)	10,286	1,347,557